85-1372

CASE NO. _____

Supreme Court, U.S.
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In The Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF OHIO,

Petitioner,

v.

WILLIAM D. RUCKELSHAUS,
Administrator, United States
Environmental Protection Agency,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

MARTHA E. HORVITZ
Assistant Attorney General

State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0414
(614) 466-2766

Counsel of Record for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Clean Air Act authorizes the United States Environmental Protection Agency to disapprove a state attainment status designation supported by adequate ambient air quality monitoring data for the reason that emissions from sources in the area to be redesignated as in attainment with national ambient air quality standards may potentially impact upon another, nonattainment area, where the administrative record contains no monitoring, modeling, or other evidence to support disapproval, and the Environmental Protection Agency admits that the area to be redesignated is in fact in attainment with the standard.

2. Whether the court of appeals employed the proper standard of review in deferring to the Environmental Protection Agency's view that nonattainment designations may be based on the location of sources of air emissions rather than on ambient air quality.

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The opinion of the United States Court of Appeals for the Sixth Circuit in *State of Ohio v. Ruckelshaus*, is reported at 776 F.2d 1333 (6th Cir. 1985), and is set out for the Court's convenience in Appendix A. The final rulemaking action by the United States Environmental Protection Agency at issue before the Sixth Circuit is published at 49 Fed. Reg. 24124 (June 12, 1984), and is included for the Court's convenience in Appendix B.

JURISDICTION

The judgment of the Sixth Circuit was entered on November 15, 1985. The jurisdiction of this Court to review that judgment is invoked pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of provisions of the Clean Air Act as amended, 42 U.S.C. Section 7401 *et seq.*, concerning the definition of attainment and nonattainment areas, 42 U.S.C. Sections 7407(d) and 7501(2), and their relationship to the authority conferred by Congress on the states as expressed in the Clean Air Act, 42 U.S.C. Sections 7401(a)(3), 7407(a), and 7410. Relevant provisions of the Clean Air Act as amended in 1977 are set out in Appendix D.

STATEMENT OF THE CASE

Ohio petitions this Court from the decision of the United States Court of Appeals for the Sixth Circuit denying Ohio's petition for review of the final action of the Administrator of the United States Environmental Protection Agency (hereinafter "EPA") disapproving the request of Ohio to redesignate Lorain County from nonattainment to attainment for the national ambient air quality standard for ozone.

Ohio submitted to EPA on November 29, 1982 a request to revise the attainment status designations with respect to the national ambient air quality standard ("NAAQS") for ozone under Section 107(d) of the Clean Air Act, 42 U.S.C. Section 7407(d), for forty-six counties from nonattainment to attainment. The request, which was made pursuant to Section 107(d)(5) of the Act, 42 U.S.C. Section 7407(d)(5), was accompanied by ozone ambient air quality monitoring data. Among the counties for which Ohio requested redesignation were Lorain, Medina, Lake and Geauga, all of which, along with Cuyahoga County, are considered part of the Cleveland urbanized area. EPA approved the redesignation of Medina County and disapproved the redesignation of Lorain, Lake, and Geauga Counties. 49 Fed. Reg. 24124 (June 12, 1984).

The ambient air quality monitoring data submitted by Ohio with its redesignation request covered the years 1980, 1981, and 1982, and showed no violations of the ozone standard in either Lorain or Medina Counties. 48 Fed. Reg. 36276 (August 10, 1983). Lorain County is west of the City of Cleveland, which is located in Cuyahoga County, and west of Medina County. Medina County is south, southwest of Cuyahoga County. Summit County is also located south of Cuyahoga County and to the east of Medina County. Lake County is located to the northeast of Cuyahoga County. Lorain, Cuyahoga, and Lake Counties are all bordered on the north by Lake Erie. EPA determined that based on meteorological data, the prevailing winds in Ohio in the summer are from the south through the west. Thus, Cuyahoga County is upwind of Lake County, and Lorain, Medina, and Summit Counties are all upwind of Cuyahoga and Lake Counties.

Despite the fact that the ambient air monitoring data showed no violations of the ozone standard in Lorain County and the acknowledgment of this by EPA, 48 Fed. Reg. 36276 (August 10, 1983), EPA proposed, 48 Fed. Reg. 36275 (August 10, 1983), and then took final action to disapprove the redesignation of Lorain County as attainment for ozone. 49 Fed. Reg. 24124 (June 12, 1984). The disapproval was based

on EPA's assumption that volatile organic compound (VOC) emissions from sources in Lorain County would impact the downwind Cleveland urban area. 48 Fed. Reg. 36276 (August 10, 1983); 49 Fed. Reg. 24125 (June 12, 1984).

EPA raised no question as to the adequacy of Ohio's monitoring data from Lorain County, and in fact conceded that based on the monitoring data Lorain County is in attainment of the ozone standard. The record reflected no air quality modeling or other studies performed by EPA to verify its assumption that VOC emissions in Lorain County are causing or contributing to ozone violations in the downwind Cleveland urban area. Rather EPA admitted that its decision on Lorain County was based on monitoring in Chicago, St. Louis, Los Angeles, and Detroit, instead of monitoring in Lorain County. 49 Fed. Reg. 24125 (June 12, 1984). The rulemaking record contained no explanation of why these monitoring data should be deemed applicable to the Cleveland area. Among the studies cited by EPA there were differences in predominant wind direction during times of elevated ozone, topography, orientation of water bodies to the land-based sources and receptors, and distance and direction of maximum ozone concentrations from the hydrocarbon sources. None of the study situations parallels the Cleveland urbanized area situation.

EPA's final rulemaking also contained a statement indicating that EPA considered Lorain and Medina Counties, both of which are part of the Cleveland urbanized area, to be in like situations, justifying the denial of the redesignation of both counties. 49 Fed. Reg. 24125 (June 12, 1984). Yet Medina County's redesignation was approved. 49 Fed. Reg. 24124 (June 12, 1984). Medina County is located generally upwind of the majority of the Cleveland area, as is Summit County. Data in the rulemaking record indicate several violations of the national ambient air quality standard for ozone in Summit County during the period 1980-1982. However, Summit County is not part of the Cleveland urbanized area, and the potential impact of VOC emissions from sources in Summit

County on the downwind Cleveland urbanized area was not considered by EPA when it acted on Ohio's request to redesignate Lorain County to attainment for ozone.[1]

Ohio petitioned the Sixth Circuit pursuant to Section 307(b)(1) of the Clean Air Act, 42 U.S.C. Section 7607(b)(1), for review of EPA's denial of its redesignation request for Lorain County, arguing that EPA's denial of Ohio's attainment status redesignation request for Lorain County on the grounds that emissions from Lorain County may potentially impact upon another, nonattainment area was not authorized by the Clean Air Act, and that EPA's denial of Ohio's request to redesignate Lorain County as attainment was not supported by the record, and was arbitrary, capricious, and an abuse of discretion. The Sixth Circuit concluded that EPA acted reasonably under the Clean Air Act, and did not act arbitrarily and capriciously in denying Ohio's redesignation request. It, therefore, denied Ohio's petition for review.

At the same time that the Sixth Circuit was considering Ohio's petition for review, the Seventh Circuit had before it a petition filed by the State of Illinois and the Illinois State Chamber of Commerce to review a final action of EPA denying Illinois' request to redesignate two counties near Chicago as in attainment with the national ambient air quality standard for

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[1] According to the data contained in EPA's technical support documents, Cuyahoga County was meeting the ozone NAAQS during the period 1980 - 1982. Summit County, in which the City of Akron is located, had several violations of the ozone standard during this period, and Lake County had a minimal violation of the ozone standard during this period. Since the monitoring data for Lorain County, which is located directly west of Cuyahoga and Medina Counties, showed attainment with the ozone NAAQS, and monitoring in Cuyahoga and Medina Counties also showed attainment with the ozone NAAQS, obviously emissions from Lorain County were not adversely impacting Cuyahoga and Medina Counties. Since Summit County is located more directly upwind of Lake County than is Lorain County, it would have been much more logical for EPA to assume that it was VOC emissions from Summit County, which is *not* in attainment with the ozone NAAQS, that are responsible for ozone problems in Lake County, rather than emissions from Lorain County. However, because Summit County is not considered to be part of the Cleveland urban area, EPA ignored the possibility that sources there may be impacting the downwind Cleveland urban area.

ozone. *Illinois State Chamber of Commerce v. United States Environmental Protection Agency,* 775 F.2d 1141 (7th Cir. 1985). (This decision is included as Appendix C.) Although EPA had previously granted a request by Illinois to redesignate two other counties upwind of Chicago as attainment, it denied this particular redesignation request on the same grounds that it had denied Ohio's redesignation request.[2] Upon review, the Seventh Circuit concluded that EPA had not provided a sufficient reasoned analysis of its action and that its action was, therefore, arbitrary and incapable of rational review in the court. *Id.* at 1147. EPA's action was remanded for reconsideration and clarification. *Id.* at 1151.

REASONS FOR GRANTING THE PETITION

This case presents an opportunity for this Court to resolve a clear conflict between the decisions of two federal courts of appeals. The conflicting determinations reflect different standards of review employed by the two courts in reviewing virtually identical actions by EPA. Thus, it is necessary for this Court to define the appropriate standard of review and the extent to which a reviewing court should defer to EPA's interpretation of the Clean Air Act in this type of case.

Additionally, this case presents an opportunity for this Court to consider a question which has not been addressed by it, but which is of great importance to the states. That question is whether EPA has authority to deny a state's request to redesignate an area, which has been shown by adequate ambient air quality monitoring data to be in compliance with national ambient air quality standards, as in attainment with national ambient air quality standards, particularly in light of the congressionally expressed intent in enacting the Clean Air Act of giving the states primary responsibility for preventing and controlling air pollution.

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[2] In the Illinois case, however, the rulemaking record did include a study of ozone transport performed in the Chicago area. *Id.* at 1143-1144. As previously noted, the rulemaking record in Ohio's case contained no such study of the Cleveland area.

Because a nonattainment designation automatically results in the imposition of additional control measures (reasonably available control technology, Clean Air Act Section 172(b)(3), 42 U.S.C. Section 7502(b)(3)), and restrictions on the construction of new and modified sources (offset requirements and compliance with lowest achievable emission rate, Section 173(1), (2), 42 U.S.C. Section 7503(1), (2)), and the threat of the imposition of sanctions if a state fails to submit a control plan for a nonattainment area that EPA finds to be adequate, the resolution of this question is of major importance to the states.

I. THE DECISION OF THE SIXTH CIRCUIT CONFLICTS WITH A RECENT DECISION OF THE SEVENTH CIRCUIT ON THE SAME ISSUE AND NEARLY IDENTICAL FACTS, RESULTING IN A DICHOTOMY IN PROCEDURAL SAFEGUARDS PROVIDED TO THE STATES AND OTHERS AFFECTED BY ACTIONS OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY WHICH SHOULD BE RESOLVED BY THIS COURT.

A. A Reviewing Court Is Obligated To Conduct A Thorough, In-Depth Review Of Agency Action To Ensure That Such Action Was Not Arbitrary, Capricious, An Abuse Of Discretion, Or Otherwise Not In Accordance With Law.

This Court has held that agency action subject to the standard of review set out in the Administrative Procedure Act, 5 U.S.C. Section 706, requires a "searching and careful" inquiry into the facts, and a determination "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 416, 91 S. Ct. 814, 824, 28 L. Ed. 2d 136 (1972). In *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual,* 463 U.S. 29, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983), the Court elaborated further on this standard of review.

> Normally an agency rule would be arbitrary and capricous if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies: "We may not supply a reasoned basis for the agency's action that the agency itself has not given." *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S. Ct. 1575, 1577, 91 L. Ed. 1995 (1947). 463 U.S. at 43, 103 S. Ct. at 2867.

The Court stressed that "an agency must cogently explain why it has exercised its discretion in a given manner." *Id.* 463 U.S. at 48, 103 S. Ct. at 2869.

In two decisions involving the same issues and almost identical facts, two United States courts of appeal approached the review of a rulemaking action by the EPA differently, resulting in an entirely different outcome. The Seventh Circuit in *Illinois State Chamber of Commerce v. United States Environmental Protection Agency, supra,* engaged in a thorough, in-depth review of EPA's action and the rulemaking record, and concluded that EPA had failed to clearly explain the rationale for its action and that its action, therefore, appeared to be arbitrary. The Court remanded the matter to U.S. EPA for further proceedings. The Sixth Circuit, on the other hand, did not carefully and thoroughly review EPA's action. Rather, it deferred to EPA's interpretation of the statute, failed to carefully consider whether the facts supported EPA's action, and affirmed.[3]

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[3] Notably, the Seventh Circuit found EPA's action to be arbitrary even though the rulemaking record in Illinois' case included a study of ozone transport in the Chicago area which was the subject of the rulemaking action. The Sixth Circuit, however, found EPA's action not to be arbitrary, even though the rulemaking record in Ohio's case contained no study of the Cleveland area under consideration.

EPA is now facing two divergent views on the adequacy of its rulemaking records. The result is that certain states, like Ohio, may be subject to less rational and informed decision-making by EPA.

B. Although EPA's Actions In Illinois And Ohio Were The Same, The Seventh Circuit Applying The Appropriate Standard Of Review Remanded EPA's Action, While The Sixth Circuit Without Engaging In A Thorough Review, Affirmed EPA's Action.

A quick review of the Sixth Circuit and Seventh Circuit cases establishes that the issues and facts of the two cases are nearly identical. Both cases involved a refusal by EPA to approve a state request to redesignate a county or counties as in attainment with the national ambient air quality standard for ozone even though monitoring data in those counties demonstrated that there were no violations of the NAAQS for ozone. In both cases EPA denied the state's redesignation request after or concurrently with the approval of a redesignation request for a similarly situated county or counties. In both cases EPA's denial of the redesignation request was based on the same intermixture of theories. The Seventh Circuit found these different theories to be inconsistent with each other and/or with positions previously taken by EPA. The Sixth Circuit failed to recognize that EPA was relying on multiple, inconsistent theories.

Thus, the Seventh Circuit found that EPA originally listed attainment/nonattainment designations on a county-by-county basis rather than on an urbanized area basis, but that EPA stated variously in the redesignation denial Illinois sought to reverse that a nonattainment area must include an entire urbanized area, and that a nonattainment area must include all sources which contribute to pollution in the area. The court determined that these explanations by EPA were not consistent with each other.

EPA's action in denying Ohio's redesignation request was similarly inconsistent. The attainment/nonattainment designations in Ohio were also originally made on a county-by-county basis. At the same time that EPA denied Ohio's request to redesignate Lorain County as in attainment with the NAAQS for ozone for the expressed reason that Lorain County is part of the Cleveland urbanized area, EPA approved the redesignation of Medina County which is also part of the Cleveland urbanized area. Moreover, EPA's rulemaking action contained a paragraph explaining that Lorain and Medina Counties were in a like situation. 49 Fed. Reg. 24125 (June 12, 1984). As in the Illinois case, EPA's rulemaking action in Ohio also contained language commenting that a nonattainment area should include all emission sources contributing to violations of the NAAQS. *Id.* Again, however, EPA did not apply this theory consistently since it did not include Medina or Summit Counties in the Cleveland ozone nonattainment area.

Nevertheless, the Sixth Circuit failed to identify EPA's various theories, or failed to recognize the inconsistencies among them. It is apparent that the Sixth Circuit did not perform the careful and probing inquiry into the facts called for by this Court when reviewing agency action. The concurrring opinion is particularly revealing in this respect:

> I write separately only to bespeak my dissatisfaction with EPA's failure to conduct measurements of the wind-factor effect in the Cleveland area of emissions from Lorain County. I find no reasonable explanation for that failure on the part of EPA in this case... My only reservation here is *this lack of proof that would have demonstrated clearly the basis for the EPA action. State of Ohio v. Ruckelshaus, supra* at 1341. (Emphasis added).

It is apparent that a reviewing court which laments the lack of proof to form the basis for an agency action cannot have concluded that the agency "articulated a satisfactory explanation for its action including a 'rational connection between

the facts found and the choice made.' . . ." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual, supra,* 463 U.S. at 43, 103 S. Ct. at 2866-2867. Clearly the Sixth Circuit did not apply the appropriate standard of review in reviewing EPA's action in this case.

EPA's justification for its action in this case bears a striking similarity to the grounds cited by the Occupational Safety and Health Administration ("OSHA") for promulgating regulations limiting occupational exposure to benzene. In *Industrial Union Department v. American Petroleum Institute,* 448 U.S. 607, 100 S. Ct. 2844, 65 L. Ed. 2d 1010 (1980), this Court struck down these regulations which were based upon an OSHA policy and a series of assumptions, *id.,* 448 U.S. at 634-635, 100 S. Ct. at 2860, developed from OSHA's interpretation of the statute, which the Court rejected. *Id.,* 448 U.S. at 651, 100 S. Ct. at 2868. Similarly, EPA's disapproval of Ohio's request to redesignate Lorain County is based on EPA's policies that all portions of an urbanized area must be designated as nonattainment if any of the urbanized area is nonattainment, and/or that all emission sources must be included in a nonattainment area. These policies are based on assumptions that emissions from sources in clean-air counties will adversely affect downwind counties. However, this policy and these assumptions were not arrived at through consideration of factors actually existing in the Cleveland area. Moreover, EPA's policy and assumptions were developed from its interpretation of the Clean Air Act that nonattainment designations may be based on the location of air emission sources rather than on ambient air quality. In *Industrial Union Department,* this Court recognized the inconsistencies in OSHA's position, the overly broad nature of OSHA's interpretation of the statute, and the impropriety of relying on assumptions in the absence of definitive proof. EPA's action in denying Ohio's redesignation request for Lorain County suffers from the same fatal defects. The Sixth Circuit, however, did not sufficiently probe the record to identify these problems with EPA's action.

II. THE DECISION OF THE SIXTH CIRCUIT IS CONTRARY TO THE INTENT OF CONGRESS EXPRESSED IN THE CLEAN AIR ACT AND PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT, WHETHER THE STATES OR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY ARE PRIMARILY RESPONSIBLE FOR AIR POLLUTION CONTROL.

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, ___U.S.___, 104 S. Ct. 2778 (1984), this Court explained the examination which must be made by a court which is reviewing an agency's construction of a statute it administers. If Congress has spoken directly to the question at issue, then the agency and the court are required to give effect to the congressionally expressed intent. If, on the other hand, the congressional intent is ambiguous or not expressed, then the court must determine if the agency's construction of the statute is permissible.

The Sixth Circuit incorrectly concluded that the Clean Air Act was silent or ambiguous as to the precise question at issue, whether EPA can deny a state's request to redesignate a county whose air quality meets the national ambient air quality standards. The court, therefore, deferred to EPA's interpretation of the statute. The result is contrary to the clearly expressed intent of Congress in enacting the Clean Air Act.

A. The Clean Air Act Clearly And Unambiguously Describes The Criteria For Determining Attainment/ Nonattainment Areas.

Section 107(d)(1) of the Clean Air Act, 42 U.S.C. Section 7407(d)(1), requires states to identify

> . . . those air quality control regions, *or portions thereof*, . . . which . . .

> (A) *do not meet* a national primary ambient air quality standard for any air pollutant other than sulfur dioxide or particulate matter;
>
> . . . .
>
> (E) *have ambient air quality levels* better than any national primary or secondary air quality standard other than for sulfur dioxide or particulate matter. . . . (Emphasis added).

It is abundantly clear that Section 107(d), 42 U.S.C. Section 7407(d), attainment status designations are concerned only with the actual ambient air quality in an area, not with the location of air pollution sources which may impact ambient air quality in another area. This conclusion is supported by the definition of "nonattainment area" in Section 171(2), 42 U.S.C. Section 7501(2):

> The term "nonattainment area" means, for any air pollutant an area which is shown by monitored data or which is calculated by air quality modeling (or other methods determined by the Administrator to be reliable) to exceed any national ambient air quality standard for such pollutant. . . .

This definition also contains no reference to the location of air pollution sources. Clearly, nonattainment areas are to be determined solely on the basis of the ambient air quality in the area. Redesignations are to be based on the same considerations. Section 107(d)(5), 42 U.S.C. Section 7407(d)(5).[4]

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[4] The Sixth Circuit incorrectly stated that redesignations are requested pursuant to Section 107(e)(1), 42 U.S.C. Section 7407(e)(1), *State of Ohio v. Ruckelshaus, supra* at 1336, 1339, and that no standards are provided in that section to govern EPA's approval or disapproval of redesignation requests. *Id.* at 1339. The court was apparently confused. Section 107(e)(1), 42 U.S.C. Section 7407(e)(1), refers to redesignations of *air quality control regions*. Air quality control regions are designated pursuant to Sections 107(b), and (c), 42 U.S.C. Sections 7407(b) and (c). Attainment and nonattainment designations pursuant to Section 107(d), 42 U.S.C. Section 7407(d), are not dependent upon air quality control region

Nevertheless, the Sixth Circuit concluded that the statute was not clear. It further decided that EPA's interpretation of the statute, which adds consideration of the location of air pollution sources which may potentially impact a nonattainment area, even though the area where the sources are located is in compliance with national ambient air quality standards, as a determinative factor in EPA's approval or disapproval of redesignation requests, was a permissible construction of the Clean Air Act. The result of this decision is to defeat the will of Congress.

B. Congress Clearly Expressed Its Intent In The Clean Air Act That The States Are Primarily Responsible For Air Pollution Control.

In Section 101(a)(3) of the Clean Air Act, 42 U.S.C. Section 7401(a)(3), Congress finds "that the prevention and control of air pollution at its source is the primary responsibility of States and local governments." The theme that the states are primarily responsible for air quality is repeated in Section 107(a), 42 U.S.C. Section 7407(a), which states: "Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State . . ." This Court has observed that under the Clean Air Act, "[s]o long as the national standards are met, the State may select whatever mix of control devices it desires." *Union Electric Co. v. E.P.A.*, 427 U.S. 246, 266, 96 S. Ct. 2518, 2530, 49 L. Ed. 2d 474 (1976). See also, *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 86-87, 95 S. Ct. 1470, 1485, 43 L. Ed. 2d 731 (1975).

States are required by Section 110 of the Clean Air Act, 42 U.S.C. Section 7410, to develop State Implementation Plans ("SIPs") which provide for achievement and maintenance of

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designations, and attainment status designations may be changed without any changes to or redesignations of air quality control regions. Section 107(d)(5), 42 U.S.C. Section 7407(d)(5), specifically provides that redesignations of attainment status are to be made on the same basis as the original attainment status designations.

NAAQS. For areas which are designated as "nonattainment" for a given pollutant, Part D of the Act requires a SIP to include implementation of stringent control measures to assure air quality improvement. Sections 171-178, 42 U.S.C. Sections 7501-7508. These are commonly referred to as "Part D SIPs". To ensure that states promptly prepare and implement their Part D SIPs, Congress included several onerous sanctions to punish the states. Among these are a ban on construction or modification of major stationary sources (Section 110(a)(2)(I), 42 U.S.C. Section 7410(a)(2)(I)), withholding of federal highway, transportation and air quality grants (Section 176(a) and (b), 42 U.S.C. Section 7506(a) and (b)), and withholding of sewage treatment construction grants (Section 316(b), 42 U.S.C. Section 7616(b)). These sanctions apply to nonattainment areas for which the state fails to submit an adequate Part D SIP.

The SIP is the mechanism by which a state determines which controls are the most efficient and effective means of improving ambient air quality. In preparing the SIP for the Cleveland urbanized area, Ohio must look at the sources in and their impacts on all five counties constituting the urbanized area, including sources in attainment areas. Ohio must then determine the most efficient and effective means of reducing emissions and thus improving air quality throughout the urbanized area.

Those controls which, by law, are mandatory for nonattainment areas (e.g., vehicle emission control inspection and maintenance programs, Section 172(b)(11), 42 U.S.C. Section 7502(b)(11), reasonably available control technology (RACT), Section 172(b)(3), 42 U.S.C. Section 7502(b)(3), lowest achievable emission rate, Section 173(2), 42 U.S.C. Section 7503(2)), may or may not be the most efficient and effective means of controlling emissions which contribute to the formation of ozone. For example, imposition of a vehicle inspection and maintenance program in an area where stationary, rather than mobile, sources cause the bulk of the problem would be a very expensive way to bring about very

little air quality improvement, and may exhaust limited resources which would be better spent ensuring that stationary sources are controlled. The SIP—not the attainment status designation—is the essence of control strategy planning, whereby the state has the ability under the Clean Air Act to choose the most effective remedies from an array of control alternatives. Yet by insisting that clean-air areas must continue to be designated as nonattainment, and therefore subjecting such areas to the mandatory controls, EPA and the Sixth Circuit have deprived Ohio of the flexibility to develop the mix of controls it finds to be most appropriate to achieve and maintain national ambient air quality standards.[5] This clearly does not comport with the congressional intent expressed in the Clean Air Act.[6]

In *Union Electric Co. v. EPA, supra,* 427 U.S. at 269, 96 S. Ct. at 2531, this Court rejected an argument that

> . . . would permit the Administrator or a federal court to reject a State's legislative choices in regulating air pollution, even though Congress plainly left with the States, so long as the national standards were met, the power to determine which sources would be burdened by regulation and to what extent.

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[5] Although Section 172(b)(3), 42 U.S.C. Section 7502(b)(3), only requires RACT for existing sources in nonattainment area, Ohio has gone a step further through the SIP by requiring stringent RACT controls on all existing major sources of volatile organic compounds in attainment areas as well. Thus, even if Lorain County were redesignated as attainment, Ohio would continue to impose all necessary controls through its SIP, but would have the flexibility intended by Congress to achieve and maintain the NAAQS in the most efficient and effective manner.

[6] In support of its decision, the Sixth Circuit cites *Western Oil and Gas Association v. United States Environmental Protection Agency,* 767 F.2d 603 (9th Cir. 1985), a decision of the Ninth Circuit upholding EPA's designation of the San Francisco bay area as nonattainment for the ozone NAAQS. The Ninth Circuit decision is distinguishable from Ohio's case before the Sixth Circuit for several reasons. The most relevant distinction here is that in *Western Oil and Gas Association,* the nonattainment designations appealed and upheld were the *initial* attainment/nonattainment designations under Section 107(d)(1), 42 U.S.C. Section 7407(d)(1), submitted and *supported by the State of California.*

By refusing to approve Ohio's request to redesignate a clean-air area as in attainment with national ambient air quality standards, EPA has eliminated the State's ability to determine which sources will be burdened by regulation and to what extent. The Sixth Circuit's affirmation of EPA's circumvention of the will of Congress should be reviewed by this Court.

CONCLUSION

This case involves an issue of great importance to the states as they have been significantly deprived of the ability to develop and implement air pollution control programs to attain and maintain national ambient air quality standards which they determine to be most efficient and effective by the Sixth Circuit's deference without adequate review to EPA's interpretation of the Clean Air Act. The failure of the court below to implement the instructions of this Court as to the appropriate standard of review a court should employ in reviewing actions of an administrative agency, as demonstrated by the conflicting decision on the same question by the Seventh Circuit, requires this Court's intervention, as does the failure of the Sixth Circuit to implement the will of Congress, plainly expressed in the Clean Air Act, to place the primary responsibility for controlling air pollution on the states. Therefore, the State of Ohio respectfully requests this Court to grant a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

MARTHA E. HORVITZ
Assistant Attorney General

State Office Tower
30 East Broad Street, 17th Floor
Columbus, Ohio 43266-0414
(614) 466-2766

Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

This is to certify that three copies of this petition for writ of certiorari were mailed pursuant to Supreme Court Rules 28.3 and 28.4 by regular U.S. Mail, this _____ day of February, 1986, to:

Solicitor General
Department of Justice
Washington, D.C. 20530

Peter S. Everett, Attorney
Environmental Defense Section
U.S. Department of Justice
Washington, D.C. 20530

Catherine Fox, Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency
Region V
230 South Dearborn Street
Chicago, IL 60604

John C. Ulfelder, Attorney
Office of General Counsel (LE-132A)
U.S. Environmental Protection Agency
401 M Street S.W.
Washington, D.C. 20460

MARTHA E. HORVITZ
Assistant Attorney General

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

STATE OF OHIO
Petitioner,

v.

WILLIAM D. RUCKELSHAUS,
Administrator, United States
Environmental Protection Agency,
Respondent.

PETITION for Review of Final Action of the United States Environmental Protection Agency.

Decided and Filed November 15, 1985

Before: LIVELY, Chief Judge; WELLFORD, Circuit Judge; BERTELSMAN, District Judge.*

LIVELY, Chief Judge, delivered the opinion of the Court, in which BERTELSMAN, District Judge, joined. WELLFORD, Circuit Judge, (p. 14) delivered a concurring opinion.

LIVELY, Chief Judge. Ohio seeks review of final action of the United States Environmental Protection Agency (EPA) under the Clear Air Act as amended (the Act). 42 U.S.C. §§ 7401 et seq. The particular provisions of the Act in controversy are portions of Part D of Subchapter I, 42 U.S.C. §§ 7501-7508, and section 107(d) and (e), 42 U.S.C. § 7407(d) and (e), all of which were added to the Act by the Clean Air Act Amendments of 1977, Pub. L. 95-95.

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*The Honorable William O. Bertelsman, Judge, United States District Court for the Eastern District of Kentucky, sitting by designation.

The question for decision is whether EPA may refuse a state's request to redesignate a county from "nonattainment" to "attainment" where actual monitoring or modeling data from the county show that air quality within the county meets the required ambient standard. EPA denied Ohio's request to redesignate Lorain County as an attainment area for ozone upon determining that, although the air within the county satisfied the National Ambient Air Quality Standards (NAAQS) for ozone, pollutants originating in Lorain County added significantly to the ozone levels in the Cleveland urban area, of which Lorain County is a part. All of the counties in the Cleveland urban area are part of the Greater Cleveland Intrastate Air quality Control Region (AQCR). Ohio argued that the boundary of the Cleveland urban nonattainment area should be changed by removing Lorain County and filed a petition for review of the EPA's action.

I.

Though the precise question presented in the present appeal is one of first impression before this court, we have dealt with the Clear Air Act Amendments of 1977 in a number of opinions. *E.g., Air Pollution Control District of Jefferson County v. U.S. E.P.A.*, 739 F.2d 1071 (6th Cir. 1984); *National Steel Corp. v. Gorsuch*, 700 F.2d 314 (6th Cir. 1983); *PPG Industries, Inc. v. Costle*, 630 F.2d 462 (6th Cir. 1980). In addition, the Supreme Court succinctly reviewed the history of the congressional efforts to bring air pollution under control in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, ___U.S.___, 104 S.Ct. 2778, 2783-87 (1984). We will not repeat this background discussion, but will go directly to the issues involved in this appeal.

Acting pursuant to section 107(d)(1) of the Act, 42 U.S.C. § 7407(d)(1),[1] Ohio listed nonattainment areas within the State. It identified the counties comprising the Cleveland urban area, including Lorain, Medina, Lake and Geauga Counties, as nonattainment for ozone. In 1982 Ohio, acting pursuant to section 107(e)(1), of the Act, 42 U.S.C. § 7407(e)(1),[2] requested a revision of the ozone nonattainment designations to remove 46 counties, including Lorain, Medina, Lake and Geauga Counties. There was no request that Cuyahoga County, where the City of Cleveland is located, be redesignated.

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[1] 42 U.S.C. §7407(d)(1) provides:

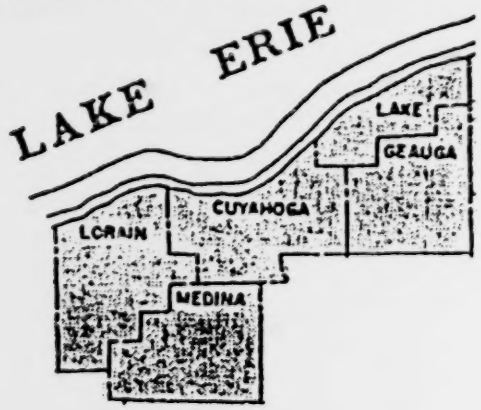
> (1) For the purpose of transportation control planning, part D (relating to nonattainment), part C (relating to prevention of significant deterioration of air quality), and for other purposes, each State, within one hundred and twenty days after August 7, 1977, shall submit to the Administrator a list, together with a summary of the available information, identifying those air quality control regions, or portions thereof, established pursuant to this section in such State which on August 7, 1977—
>
> (A) do not meet a national primary ambient air quality standard for any air pollutant other than sulfur dioxide or particulate matter;
>
> (B) do not meet, or in the judgment of the State may not in the time period required by an applicable implementation plan attain or maintain, any national primary ambient air quality standard for sulfur dioxide or particulate matter;
>
> (C) do not meet a national secondary ambient air quality standard;
>
> (D) cannot be classified under subparagraph(B) or (C) of this paragraph on the basis of available information, for ambient air quality levels for sulfur oxides or particulate matter; or
>
> (E) have ambient air quality levels better than any national primary or secondary air quality standard other than for sulfur dioxide or particulate matter, or for which there is not sufficient data to be classified under subparagraph (A) or (C) of this paragraph.

[2] 42 U.S.C. § 7407(e)(1) provides:

> (1) Except as otherwise provided in paragraph (2), the Governor of each State is authorized, with the approval of the Administrator, to redesignate from time to time the air quality control regions within such State for purposes of efficient and effective air quality management. Upon such redesignation, the list under subsection (d) of this section shall be modified accordingly.

EPA published a notice of proposed rulemaking on August 10, 1983 in response to the request. The notice invited public comment and stated that EPA proposed to grant the request as to 36 counties and deny it as to ten, including Lorain and Medina. Following the period of comment, EPA issued its final rulemaking, approving Ohio's redesignation of 37 counties and desapproving the redesignation of nine counties, including Lorain. 49 *Fed. Reg.* 24124 (June 12, 1984). The county approved for redesignation as "attainment" in the final action that had been refused redesignation in the first EPA, proposal was Medina. Following the final action of EPA, the Cleveland urban nonattainment area consisted of Cuyahoga, Lorain, Geauga and Lake Counties.

It is undisputed that monitoring data showed that the air within Lorain County met the NAAQS for ozone. EPA recognized this fact, but refused to redesignate Lorain County on the ground that a significant portion of the ozone pollution in the Cleveland urban nonattainment area derives from emissions in Lorain County, which lies upwind from the other three counties in the nonattainment area. The geographical relationship of the four counties in the designated nonattainment area, plus Medina County, is shown in the portion of the Ohio map of counties reproduced here:



In its comments on proposed rulemaking Ohio conceded that "[e]missions from Lorain County contribute to the ozone concentrations in the Cleveland area and should be included in the design of any control program." (Letter from Ohio EPA to U.S. EPA, August 12, 1983). However, Ohio took the position that Lorain County was not in air quality violation for ozone and should not be listed as nonattainment.

II.

Though Ohio makes a number of subsidiary arguments, its basic position is that the Act does not authorize EPA to disapprove a reasonable state designation of an area as "attainment" on the ground that emissions from the area may potentially add to the pollution of a nonattainment area. Underlying this argument is the contention that the state may treat a county as an "area" for purposes of § 7407(d)(1) and require EPA to so treat it, despite the fact that EPA has designated the county as part of a larger area. Ohio relies on the definition of "nonattainment area" in section 171(2) of the Act, 42 U.S.C. § 7501(2) (1982), "an area which is shown by monitored data or which is calculated by air quality modeling (or other methods determined by the Administrator to be reliable) to exceed any national ambient air quality standard for such pollutant." Since Lorain County has shown by monitored data that its air does not contain ozone in excess of the NAAQS, it cannot be brought within this definition and, thus, may not be designated "nonattainment."

Ohio recognizes that Lorain County is in the Cleveland urban area but insists that it may subdivide that area by counties on the basis of air quality information. Ohio argues that the states have the primary role in making such decisions, and EPA should accord deference to state determinations regarding the size of areas designated. Given the measured air quality data on which the request for redesignation of Lorain County was based, EPA acted arbitrarily and capriciously in continuing to designate Lorain County "nonattainment," according to Ohio.

Ohio also argues that EPA had an alternative and preferable means at its disposal for dealing with the Cleveland ozone problem. EPA should have approved the redesignation of Lorain County to attainment, but required Ohio to amend its State Implementation Plan (SIP) to insure that pollutants from Lorain County, though an attainment area, did not add significantly to the ozone problems of the downwind Cleveland area. Ohio contends that SIPs are at the heart of the entire scheme for improving the quality of the Nation's air, and that EPA should be required to follow this path to achieve NAAQS within Ohio, including the Cleveland area. Ohio's preference for this alternative means of enforcing compliance with the NAAQS arises from the fact that Part D of the Act, which applies only to nonattainment areas, contains significant enforcement tools not available to EPA under other provisions. For example, EPA can impose a ban on new construction, require a new source review program that may require greater emissions reduction than other sections of the Act would require, require a motor vehicle inspection and maintenance program with a cuttoff of federal funds for noncompliance and require ozone sources to meet emissions limitations at least reflective of reasonably available control technology. The possibility of a ban on new construction and the loss of federal funds for failure to implement a vehicle inspection and maintenance program are matters of serious concern to a local government unit.

Finally, Ohio contends that the record does not support EPA's disapproval of the request for redesignation of Lorain County. Instead of relying on modeling or monitoring in the Cleveland area, EPA based its conclusions about Lorain County's contributions to Cleveland's ozone levels on findings made with respect to other major urban centers such as Chicago, St. Louis, Los Angeles and Detroit. In addition, Ohio charges that EPA was totally inconsistent in approving redesignation of Medina County, which also has a direct association with the Cleveland area, while disapproving the request for Lorain County.

III.

EPA maintains that it acted reasonably and within its clear authority under § 7407 in disapproving Ohio's request with respect to Lorain County. It is not required to designate nonattainment areas by reference to county boundaries. Thus, the fact that a county within a nonattainment area is not in violation of NAAQS for a pollutant is irrelevant. As EPA interprets § 7407(d), it is permitted to designate nonattainment areas by boundaries which include important sources of pollution that contribute to the pollution levels of the area, without making a separate determination for each political subdivision within the area. EPA asserts that its interpretation of the statute is reasonable since it serves the underlying goal of the Act by requiring steps to be taken that will move an area toward attainment. EPA finds nothing in the language or legislative history of the Act or the 1977 Amendments that would require it to make Lorain County a "section 107(d) area" separate from the general Cleveland urban area of which it is a part

EPA argues that keeping Lorain County within the nonattainment area serves the purpose behind the enactment of Part D. That purpose was to bring about incremental air quality improvement and timely attainment of national standards in those areas that failed to attain the NAAQS by the deadlines originally set out in the Act. The fact that EPA might have proceeded by the alternate route of requiring Ohio to revise its SIP does not deprive it of authority to proceed under § 7407(d) and Part D, which were designed specifically to deal with the nonattainment problem to which the 1977 Amendments were directed.

EPA responds to Ohio's charge that its denial of redesignation was not supported by the record with several contentions. In the first place, it points to Ohio's admission that pollutants from Lorain County contribute to Cleveland's ozone problem.

It also argues that the record contains meterological data which indicate that the prevailing winds during the peak ozone season do flow from Lorain County to Cuyahoga and Lake Counties. Further, monitoring results in the Cleveland urban area showed ozone violations. These are included in the record. In addition, the record contains documentation that significant quantities of ozone precursors are emitted from sources in Lorain County. Lorain County's emissions constitute 18.7% of the total organic pollutant emissions originating in the four county Cleveland urban nonattainment area.

With respect to the use of data from other urban areas, EPA makes two responses. In the first place, it notes that Ohio did not object to the use of these data during the administrative proceedings, and argues that it may not object at this stage. In addition, EPA maintains that the causes of ozone buildups in the area of other large cities provides valid data for determining the effect of Lorain County's emissions on Cleveland.

IV.

A.

In considering an agency's construction of a statute which it administers a court applies a narrow standard of review. If Congress has spoken directly to the precise question in issue, and its intent is clear, that ends the inquiry because both the agency and the court "must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, _U.S._, 104 S.Ct. 2778, 2781-82 (1984) (footnote omitted). If the court determines that Congress has not addressed the precise question directly, the duty of the court is to determine whether the agency has based its answer to the question "on a permissible construction of the statute." *Id.*, at 2782. The Supreme Court has long recognized the principle of deference which requires courts to accord "considerable weight" to the construction by an executive department of a statute that it administers. *Id.*

The principle of deference does not permit the court to become a rubber stamp, automatically approving every agency interpretation of a statute. Rather, it requires "a searching and careful" inquiry into the facts of each case to determine that the agency has acted within the scope of its statutory authority. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416 (1971). After this determination has been made, in order to approve agency action the reviewing court must find that the agaency's choice satisfies the standard of the Administrative Procedure Act (APA), that is, that it is not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This court has recently held that the APA standard presumes that agency actions are valid and that we are required to uphold EPA decisions supported by a "rational basis." *Air Pollution Control District of Jefferson County v. United States Environmental Protection Agency,* 739 F.2d 1071, 1083 (6th Cir. 1984). As we noted in *National Steel Corp. v. Gorsuch,* 700 F.2d 314, 321 (6th Cir. 1983), it is not necessary that the agency's construction of the statute be the only permissible one. Rather, its construction "must be upheld unless that view is plainly *unreasonable.*" (Emphasis in original).

B.

With these firmly established principles in mind, we turn to the issues in this case. The statutory provision in question, § 7407(d)(1), does not speak directly to the precise question of whether EPA may include in a nonattainment area a county whose air quality meets national standards. The statute requires each state to identify "those air quality regions, or portions thereof" which do not meet the NAAQS for any air pollutant. Counties are not mentioned, but both Lorain and Medina Counties had previously been included in the Greater Cleveland AQCR. Part D of the Act defines "nonattainment area" as "an area which is shown by monitored data or which

is calculated by air quality modeling (or other methods determined by the Administrator to be reliable) to exceed any national ambient air quality standard" for a particular pollutant. § 7501(1). Again, Congress has not directly dealt with the question posed by this appeal. This definition addressed "nonattainment" without prescribing any criteria for determining the proper components of an "area." In addition, § 7407(e)(1) provides no standard which is to be followed by the administrator of EPA in approving or disapproving a request for redesignation. Thus under the *Chevron* formulation we seek to determine whether EPA's answer to the question is "based on a permissible onstruction of the statute." 104 S.Ct. at 2782.

We conclude that EPA acted reasonably in determining that Lorain County should be included in the Cleveland urban nonattainment area even though actual monitoring disclosed an acceptable level of ozone within the county. The purpose of the Clean Air Act Amendments of 1977 was to ensure additional efforts to bring those areas of the country which had not met the time requirements of the Act into compliance. Congress adopted the scheme of divding states into attainment, nonattainment and unclassified areas. For nonattainment areas it provided new stringent sanctions which could be applied by EPA to encourage compliance. *United States Steel Corp. v. United States Environmental Protection Agency,* 605 F.2d 283, 284-85 (7th Cir. 1979), *cert. denied,* 444 U.S. 1035 (1980). Once a state has designated an area "nonattainment," that area may be redesignated only with the approval of EPA. It appears a permissible exercise of this authority for EPA to deny redesignation with respect to a component of a nonattainment area which produced a substantial portion of the area's pollution even though the air within that component tests at an acceptable level. If it were otherwise, the fortuitous circumstance that pollutants and precursors emitted within a county are moved by prevailing winds to a neighboring county would deprive EPA of the tools Congress provided for

attacking pollution in the area of which the county is logically a part. The Cleveland urban area fits the definition of a nonattainment area because the ozone levels in and around Cleveland exceed the NAAQS.

In response to 1980 directions from the United States Court of Appeals for the Ninth Circuit, EPA promulgated criteria for defining nonattainment status. 46 *Fed. Reg.* 55722-25 (1981); see *Western Oil and Gas Association v. United States Envrionmental Protection Agency*, 633 F.2d 803, 813 (9th Cir. 1980) (WOGA I). Criterion No. 5 stated

> A nonattainment area should be as small as possible while encompassing all areas of expected violation and all sources of significant impact on those violations.

46 *Fed. Reg.* 55724 (1981).

Western Oil and Gas Association (WOGA) criticized the criterion to the extent it prescribed the inclusion of all sources of significant impact on violations. When EPA included Criterion No. 5 in a final rulemaking, WOGA petitioned for review, seeking an "attainment" designation for portions of the San Francisco Bay Area which contained heavy industrial concentrations, but would have been attainment areas if treated separately. As in the present case, the disputed areas were upwind from portions of the Bay Area which were clearly nonattainment. The Court of Appeals upheld EPA's designation of the downwind portions of the area as nonattainment even though the air within those portions satisfied the NAAQS. *Western Oil and Gas Association v. United States Environmental Protection Agency*, 767 F.2d 603 (9th Cir. 1985) (*WOGA II*). The court determined that Criterion No. 5 was entirely consistent with the language of the Act, as amended, and with the legislative history.

We agree with the Ninth Circuit's conclusions in *WOGA II*. As did WOGA in that case, Ohio relies in the present case on *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979). The Ninth Circuit dismissed WOGA's arguments by stating that *Alabama Power* concerned Part C of the Act, which was not in issue. We agree that *Alabama Power* is not controlling. Part C deals with the prevention of significant deterioration of air quality in areas that have attained national standards for ambient air quality. The court in *Alabama Power* concluded that for purposes of the requirements of Part C, Congress intended that the location of a proposed source of pollution should be the key determinant in deciding whether a PSD (prevention of significant deterioration) permit should be required for construction in "any area to which this part [Part C] of the Act applies." *Id.* at 365-66. The court vacated EPA's denial of a PSD permit because the proposed source was not in an area to which the PSD requirements applied. From this holding Ohio argues that the location of pollution emitting sources in Lorain County, where the NAAQS have been met, provides no justification for including the county in a nonattainment area.

The D. C. Circuit found in *Alabama Power* that Congress had clearly stated its intention that location control in dealing with PSD permits under Part C. No such clear intent can be discerned with respect to the designation of nonattainment areas for purposes of Part D. In the absence of such a clear statement, EPA is authorized to require the boundaries of a nonattainment area to include those places whose emissions contribute significantly to measured "exceedences." This is not an unreasonable construction of the Act, given its overriding purpose.

C.

Having concluded that EPA acted within the scope of its authority, we must now consider whether it acted arbitrarily and capriciously in this case, as claimed by Ohio. Ohio admitted on the record that emissions from Lorain county contribute to the ozone concentrations in the Cleveland area. Given this concession, it is difficult to conceive how EPA could be found to have acted arbitrarily or capriciously by including Lorain County in the Cleveland urban nonattainment area. The technical materials in the record support the conclusion that the contribution of Lorain County's emissions to the Cleveland ozone problem is significant. We do not believe the fact that EPA did not conduct measurements of the wind-factor effect in the Cleveland area is important. The tests in other major urban areas demonstrated satisfactorily that ozone precursors are carried long distances in the atmosphere and combine with other substances to form ozone in such areas. The results of tests in a number of urban areas were sufficiently similar to form a reliable basis for concluding that the same condition would occur in Cleveland. Even if these data were not sufficient to support EPA's conclusion, Ohio cannot escape its own concession of the effect of Lorain County's emissions on the ozone concentrations in the Cleveland area.

Ohio also argues that EPA acted arbitrarily in redesignating Medina County while refusing to remove the "nonattainment" designation from Lorain County. Both counties lie upwind from both Cleveland and Lake County which have ozone levels in excess of the NAAQS. However, compared with the emissions from Lorain County, those from Medina County are insignificant. Lorain County is heavily industrialized while Medina is largely rural with only scattered sources of pollution. EPA acted in the exercise of its discretion in removing Medina County from the nonattainment area while refusing to redesignate Lorain County. We find no abuse of discretion.

The petition for review is denied.

WELLFORD, Circuit Judge, concurring. I concur with the able analysis of the issues in this case by Chief Judge Lively. I write separately only to bespeak my dissatisfaction with EPA's failure to conduct measurements of the wind-factor effect in the Cleveland area of emissions from Lorain County. I find no reasonable explanation for that failure on the part of EPA in this case, and the conducting of such tests would certainly have made this case less difficult in disposition. My only reservation here is this lack of proof that would have demonstrated clearly the basis for the EPA action.

APPENDIX B

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 81

[A-5-FRL-2602-8]

Designation of Areas for Air Quality Planning Purposes; Attainment Status Designations: Ohio

AGENCY: U.S. Environmental Protection Agency (EPA).

ACTION: Final rulemaking.

SUMMARY: EPA is approving a request from the State of Ohio to revise the attainment status designations, at 40 CFR 81.336, of 37 counties in Ohio from nonattainment to attainment relative to the ozone National Ambient Air Quality Standard. These counties are: Allen, Ashland, Belmont, Brown, Carroll, Champaign, Darke, Erie, Fairfield, Fayette, Fulton, Hancock, Harrison, Henry, Highland, Hocking, Holmes, Huron, Knox, Lawrence, Logan, Madison, Marion, Medina, Morrow, Ottawa, Perry, Pickaway, Richland, Ross, Sandusky, Seneca, Shelby, Tuscarawas, Union, Wayne, and Wood.

Additionally, EPA is denying the State's request to redesignate Columbiana, Delaware, Geauga, Greene, Lake, Licking, Lorain, Miami, and Trumbull Counties from nonattainment to attainment.

The intent of this notice is to discuss the result of EPA's review of the State's redesignation request and the public comments received regarding EPA's proposed action, and to approve and deny the State's request as noted above. Under the Clean Air act, designations can be changed if sufficient data are available to warrant such change.

EFFECTIVE DATE: July 12, 1984.

ADDRESSES: Copies of the redesignation request, technical support documents and the supporting air quality data are available at the following addresses:

Environmental Protection Agency, Region V, Air Programs Branch, 230 S. Dearborn Street, Chicago, Illinois 60604

Ohio Environmental Protection Agency, Office of Air Pollution Control, 361 East Broad Street, Columbus, Ohio 43216.

FOR FURTHER INFORMATION CONTACT: Debra Marcantonio, Air and Radiation Branch (5AR-26), Environmental Protection Agency, Region V, Chicago, Illinois 60604, (312) 886-6088.

SUPPLEMENTARY INFORMATION: Under section 107(d) of the Clean Air Act (CAA) the Administrator of EPA has promulgated the National Ambient Air Quality Standards (NAAQS) attainment status for all areas within each State. See 43 FR 8962 (March 3, 1978) and 43 FR 45993 (October 5, 1978). These area designations are subject to revision whenever sufficient data become available to warrant a redesignation. In the State of Ohio, 63 counties are currently designated as not attaining the NAAQS for ozone.

On November 29, 1982, the Ohio EPA (OEPA) submitted: (1) A request to EPA to revise the section 107 attainment status designations for the 46 counties listed in the Summary portion of this notice; and, (2) Recent ozone ambient air quality monitoring data collected in the State. In reviewing OEPA's redesignation request EPA analyzed the monitoring data submitted by the State, along with supplemental monitoring data from areas adjoining the counties for which the State requested redesignation. EPA also analyzed population data, volatile organic compound (VOC) emissions data, and the locations of the counties under consideration in culated from observed number of exceedances by making the assumption that the relation to the proximity of other non-attainment areas.

Redesignation Criteria for Ozone

The NAAQS for ozone is defined to be violated when the annual average expected number of daily exceedances of the standard (0.12 parts per million (ppm), 1-hour average) is greater than one (1.0). A daily exceedance occurs when the maximum hourly ozone concentration monitored during a given day exceeds 0.124 ppm ("Guideline for the Interpretation of Ozone Air Quality Standard", EPA-450/4-79-003). The expected number of daily exceedances is calnonmonitored days (invalid or incomplete) have the same fraction of daily exceedances as observed on monitored days (EPA-450/4-79-003).

Specific criteria for ozone redesignation reviews are given in an EPA April 21, 1983, memorandum entitled "Section 107 Designation Policy Summary" from Sheldon Meyers, Director of the Office of Air Quality Planning and Standards, and a December 23, 1983, memorandum entitled "Section 107 Questions and Answers" from G. T. Helms, Chief Control Programs Operations Branch. These documents are in the record for this rulemaking action and are available for public review at the Region V office. These documents indicate that the three most recent years of ozone data at each site should be considered in the review of redesignation requests. The April 21, 1983, guidance indicates that less than three years of ozone data may be considered as adequate support for redesignations to attainment if no exceedances of the ozone standard have occurred in the most recent year or two years and if enforceable emission reductions can be demonstrated to be the cause of the recent air quality improvements. Consideration of only the most recent year also requires the use of a state-of-the-art modeling analysis (such as city-specific EKMA) to demonstrate the adequacy of recent emission reductions. Finally, and of significant importance for today's rulemaking, the guidance indicates that urban ozone nonattainment areas should include all of the urbanized area, and fringe areas of development, and all of the significant Volatile Organic Compound (VOC) sources assumed to be responsible for the downwind ozone problem.

The current EPA redesignation policy as defined in the April 21, 1983 policy memorandum, specifically states that redesignations from nonattainment to unclassifiable are unacceptable. The current policy is based on the assumption that states have had ample time since 1978 to thoroughly study each nonattainment area to determine the correct nature of the area. However, contrary to the assumptions reflected in this policy, some nonattainment areas have not been monitored. A number of areas were designated as nonattainment based purely on the assumption that, due to their locations, these areas would experience violations of the 0.08 ppm standard (the standard prior to February 8, 1979). Many of these areas have never been monitored. In these areas, it is necessary to base the designations upon the nature of ozone formation/transport observed in other monitored areas.

Based on EPA's review of the State's request and the supporting monitored ozone concentrations during the 1980 thru September 1982 period, on August 10, 1983 (48 FR 36275) EPA proposed to revise the designation status relative to the ozone NAAQS to attainment for Allen, Ashland, Belmont, Brown, Carroll, Champaign, Darke, Erie, Fairfield, Fayette, Fulton, Hancock, Harrison, Henry, Highland, Hocking, Holmes, Huron, Knox, Lawrence, Logan, Madison, Medina, Morrow, Ottawa, Perry, Pickaway, Richland, Ross, Sandusky, Seneca, Shelby, Tuscarawas, Union, Wayne, and Wood Counties. Additionally, EPA proposed to deny the State's request to redesignate Columbiana, Delaware, Geauga, Greene, Lake, Licking, Lorain, Marion, Miami, and Trumbull Counties from nonattainment to attainment/unclassifiable.

Today EPA is taking final action to approve and deny the portions of the States request as noted above with one exception. As a result of EPA's review of the public comments, EPA now agrees that Marion County should also be designated to attainment. Therefore, EPA is redesignating the 36 counties it proposed to redesignate on August 10, 1983 and Marion County to attainment of the ozone NAAQS. Further discussion on EPA's action on designating Martion County is contained in the public comment section of this notice.

Response to Comments on EPA's Proposed Rulemaking

During the public comment period three sets of comments were received. Each issue is discussed below.

Comment

The State commented that EPA's proposed disapproval of the State's request to redesignate Lorain County to attainment is contrary to the definition of a nonattainment area contained in section 171(a)(2) of the CAA. Section 171(a)(2) defines a nonattainment area as "* * * an area which is shown by monitored data or which is calculated by air quality modeling (or other methods determined by the Administrator to be reliable) to exceed any national ambient air quality standard * * *." The State contends that, since available ozone monitoring data show no violations of the ozone standard in Lorain County during the most recent three years and no modeling data exist to prove otherwise, EPA should approve the redesignation of Lorain County. This redesignation should be approved regardless of the VOC emission characteristics of Lorain County.

EPA Response

EPA disagrees with the State's narrow interpretation of nonattainment. Part D of the CAA requires states to develop SIPs for nonattainment areas which provide for the attainment of the NAAQS. Since Part D plans are required only for the nonattainment areas, it is important that the nonattainment areas are of sufficient size to include all emission sources (VOC sources in the case of ozone nonattainment areas) which contribute significantly to the violations of the NAAQS.

If, as the State comments, the nonattainment area is interpreted to be a smaller area (including only those counties with monitored ozone violations), it could be further argued that the planning agencies should only inventory and control those sources within the nonattainment area even when sources upwind are significant contributors to NAAQS violations.

Under this scenario, the probable under-control of sources outside of the nonattainment area could result in a technically unsound control strategy and continued NAAQS violations.

Based on the regional nature of ozone formation and on the above arguments, EPA's current designation policy (Apr. 21, 1983 memorandum) requires an urban ozone nonattainment area to include all of the urbanized area and adjoining areas of significant VOC emissions. Since it was previously determined that Lorain County contains part of the Cleveland urbanized area as well as the contiguous Lorain-Elyria urbanized area and is a significant VOC emission area with potentially significant downwind ozone impacts, EPA disagrees with the State's comment and continues to consider Lorain County as part of the Cleveland ozone nonattainment area. EPA cannot, therefore, approve the State's request to redesignate Lorain county to attainment.

Comment

The State comments that EPA has previously evaluated ozone designations on a county-by-county basis. The State considers EPA's proposed rulemaking for those counties for which EPA proposed to deny Ohio's redesignation request to be contrary to past actions.

EPA Response

EPA Region V has not previously redesignated to attainment any counties containing significant portion of an urbanized area which has experienced current ozone standard violations at other locations within the urban nonattainment area. Therefore, EPA has not not previously redesignated to attainment areas on a strict county-by-county basis.

EPA has in the past redesignated non-monitored/non-urban (rural) counties to "unclassifiable". Such a redesignation, however, is no longer acceptable, as discussed above.

EPA believes that, lacking other supporting data, proximity to major VOC emission areas (primarily major urbanized areas) and consideration of prevailing wind directions forms an appropriate and reasonable basis for assessing requested redesignations from nonattainment to attainment. EPA bases its decision in this case on ozone concentrations monitored in and downwind of major urbanized areas, such as Chicago, St. Louis, Los Angeles, and Detroit. Based on these observations and on the direct association of Lorain and Medina Counties with the Cleveland urban area, EPA continues to believe that the denial of the redesignation of the ten counties, as listed above, is appropriate.

Comment

The State contends that no basis in law exists to support EPA's implication of nonattainment based on proximity to nonattainment counties. In addition, an Ohio property owner protested "the depriving of any county of the United States from having a classification of attainment due to its proximity to any other county", and alleged that the Agency was engaged in unconstitutional activity as a result. More specifically, the citizen complained that the Agency was unlawfully seizing property rights of people in rural areas, in violation of the 4th and 5th Amendments of the Constitution.

EPA Response

Section 107 of the CAA gives EPA the authority to review and rulemake on area air quality designations. Since it is EPA's current policy (April 21, 1983 memorandum) to redesignate areas as only attainment or nonattainment, it is necessary for EPA to establish some criteria for the redesignation of non-monitored areas. For a non-monitored area, it is logical to assume a designation based on its proximity to major precursor source areas (generally major urban nonattainment areas) taking into consideration prevailing wind directions. Data from areawide ozone/precursor studies in the vicinity of major urban areas, such as St. Louis and Philadelphia, as well

as data from rural sites in Region V indicate that ozone transport at significant concentration levels can occur over considerable distances downwind from urban areas. Based on this observation, EPA believes that non-monitored counties immediately downwind of major urban nonattainment areas should be assumed to be nonattainment until such time as in-county ozone data become available proving otherwise or until the urban area is redesignated to attainment.

EPA does not agree that this policy leads to any unconstitutional activity on the part of the Agency through the unlawful seizure of property rights of rural land owners. Property rights do not exist independent of certain responsibilities to the public interest. Courts have consistently applied a type of balancing test to the concept of private property such that the public interest in preserving or preventing further deterioration to land may outweigh the conflicting interest of a private owner in fully exploiting the economic profitability of his land. Any restrictions which may be imposed on ozone nonattainment areas in the form of growth restrictions do not prohibit the landowner from making a limited but reasonable use of his land, and cannot be viewed as a permanent taking of property rights.

Comment

The State comments that, since prevailing winds, as discussed by the EPA in the proposed rulemaking, are from the south-west in Ohio, Columbiana County, Delaware County, and Trumbull County are not "downwind" of their associated, adjacent urban nonattainment areas, as claimed by EPA.

EPA Response

The State has misinterpreted EPA's discussion in the proposed rulemaking to imply that a single prevailing wind direction may be considered. When EPA refers to an area as being downwind of a major VOC emission source area, EPA is

referring to the area into which ozone or its precursors is transported from the VOC emission area. Wind directions fluctuate considerably on any given day and from day-to-day. During an ozone season, a wide range of trajectories exist over which ozone or its precursors is transported from a source area. Inspection for windroses for Ohio during previous ozone seasons indicates wind directions from the quadrant of south thru west predominate. These analyses focused on the days with high ozone formation potential by only considering data for days with peak temperatures in excess of 75 degrees Fahrenheit. Based on the results of these analyses, it is assumed that areas lying in the general direction of north through east of major urban areas may be considered to be predominately downwind of these urban areas during the ozone season. The downwind areas are relatively large in extent.

Recognizing that ozone concentrations in excess of the standard have been monitored in excess of fifty kilometers downwind of major urban areas, such as Chicago, St. Louis, Los Angeles, New York, Detroit, etc., it is appropriate to assume that some of the non-monitored/nonattainment areas in Ohio would currently experience ozone standard violations. These areas include Columbiana (downwind of Canton), Delaware (downwind of Columbus), and Trumbull (downwind of Youngstown) counties. Therefore, the EPA disagrees with the State's comments on this issue.

Comment

The State comments that Geauga County lies close to Lake Erie and may be subject to lake breeze effects, which the State believes EPA did not take into account in its analysis.

EPA Response

It is unclear to EPA what the State intended to imply in this comment. If the State implies that lake breezes would be responsible for ozone standard violations in Geauga County

and should not be considered, EPA must point out that lake breezes are common occurrences along the areas adjoining Lake Erie and other large bodies of water. EPA does not consider these to be abnormal, infrequent phenomena and, therefore, does not exlude from consideration ozone exceedances caused by such phenomena.

If the State implies that lake breezes lead to significant ozone transport between Cleveland, and Geauga County, EPA agrees that such a pollutant effect could exist. This may explain a means by which ozone standard exceedances could occur in Geauga County as a result of ozone precursor emissions in Cleveland. It does not argue against the possible existence of such exceedances. EPA continues to believe that Geauga County is a nonattainment area for ozone.

Comment

The State comments that it does not consider Jefferson County to be a significant VOC source area affecting ozone levels in Columbiana County. As evidence for this, the State indicates that only one ozone standard exceedance occurred in Jefferson County during the 1981 through 1982 period and that no exceedances have been recorded thus far in 1983. The State is opposed to EPA's denial of the redesignation of Columbiana County.

EPA Response

Considering the fact that Steubenville (the largest city in Jeffson County) is not a major urbanized area (defined to have a population equal to or in excess of 200,000), EPA agrees with the State that a solid conclusion can not be drawn concerning the potential impact of Jefferson County VOC emissions on Columbiana County ozone levels. Nevertheless, Columbiana County is immediately east of Stark County, which contains the major urban area of Canton. Under the assumptions applied by EPA in the review of Ohio's redesignation request, Columbiana County is still considered to be an

ozone nonattainment area due to its proximity to the Canton urban nonattainment area.

Comment

The State comments that the areas of West Virginia immediately adjacent to Columbiana County have always been designated as attainment for ozone. The State considers this to be an inconsistency in designation based on regulations contained in 40 CFR Part 56. The implication of this comment is that the West Virginia area adjoining Columbiana County should be redesignated to nonattainment or that Columbiana County should be redesignated to attainment.

EPA Response

Conceding that Jefferson County, Ohio may not be a significant VOC source area causing downwind ozone standard exceedances, one must conclude that the West Virginia counties do not adjoin an upwind major VOC source area.

Therefore, the West Virginia counties in question would pass the tests for attainment as applied to the non-monitored, rural Ohio counties. Columbiana County should remain as nonattainment based on its proximity to the Canton urbanized nonattainment area.

Comment

The State comments that EPA may not use the implication of nonattainment based on association with major urban nonattainment areas or monitored rural nonattainment areas to deny the redesignation of Columbiana, Delaware, Geauga, Greene, Licking, Miami, and Trumbull Counties.

EPA Response

Current EPA designation policy (April 21, 1983 memorandum), as noted above, requires that potential redesignation

areas be determined to be either in attainment or nonattainment of the NAAQS. Under this policy, designation of unclassifiable is no longer appropriate. Prior observations of ozone formation and transport in the vicinity of major urban areas support the policy applied in the August 10, 1983 notice of proposed rulemaking. In other words, EPA continues to consider Columbiana, Delaware, Geauga, Greene, Licking, Miami, and Trumbull Counties to be nonattainment for ozone based on their proximity to major urban nonattainment areas, and the regional nature of ozone formation.

Comment

The State and an industrial commenter have commented that Marion County should be considered to be in attainment of the ozone NAAQS based on in-county data and ozone data from monitors in other surrounding counties. This data had certain deficiencies in that certain monitoring data which should have been collected at the Marion County site was missing for a number of days. Despite the deficiency, the State indicates that peak ozone data from six monitors in Clark, Lucas, and Franklin Counties on days where data was missing at the Marion County site would imply that the Marion County site would not have experienced an exceedance of the ozone standard during the missing days. The support data supplied by the State are included in the technical support document for this rulemaking action.

The industrial commenter has established correlations between Marion County peak ozone data and peak ozone data from Franklin and Sandusky counties during 1980. These correlations have been used to estimate the probable peak ozone concentrations at the Marion County site on the missing days.

It is the opinion of both of these commenters that the expected ozone exceedances for Marion County should be calculated assuming that the missing days did not have ozone standard exceedances.

EPA Response

Although the approaches put forward by the State and the industrial commenter are not standard data review procedures applied by EPA, the data presented do support an assumption that exceedances did not occur on any of the days with missing data. The State-supplied data, in particular, support this assumption.

These data were collected in the urban nonattainment areas most likely to impact the Marion County area. Marion County contains no major urban area. Any ozone standard exceedances experienced in Marion County may be reasonably expected to result from ozone transport from the nearby major urban areas covered by the State's data. These data imply that the days in question probably were not conducive to formation of high ozone concentrations in excess of the standard. Therefore, EPA agrees that the expected number of ozone standard exceedances should be 1.0 for the year monitored, and that Marion County should be redesignated to attainment for ozone.

Conclusion

Based on EPA's review of the State's redesignation request and the construction of the public comments EPA is approving and disapproving the State's redesignation request to redesignate counties relative to the ozone NAAQS as follows:

1. Redesignating to attainment (approval of requent): Allen, Ashland, Belmont, Brown, Carroll, Champaign, Drake, Erie, Fairfield, Fayette, Fulton, Hancock, Harrison, Henry, Highland, Hocking, Holmes, Huron, Knox, Lawrence, Logan, Madison, Marion, Medina, Morrow, Ottawa, Perry, Pickaway, Richland, Ross, Sandusky, Seneca, Shelby, Tuscarawas, Union, Wayne, and Wood Counties.

2. No charge (denial of request): Columbiana, Delaware, Geauga, Greene, Lake, Licking, Lorain, Miami, and Trumbull Counties.

The Office of Management and Budget has exempted this rule from the requirements of Section 3 of Executive Order 12291.

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by August 13, 1984. This action may not be challenged later in proceedings to enforce its requirements. (See 307(b)(2).)

List of Subjects in 40 CFR Part 81

Air pollution control, National parks, Wilderness areas.

This notice is issued under authority of Sections 107(d) and 301 of the Act, as amended (42 U.S.C. 7407(d) and 7601).

Dated: May 31, 1984.

William D. Ruckelshaus,
Administrator.

APPENDIX C

ILLINOIS STATE CHAMBER OF COMMERCE, Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.

and

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY, Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, Respondent.

Nos. 84-2364, 84-2365.

United States Court of Appeals,
Seventh Circuit.

Argued June 6, 1985.

Decided Nov. 4, 1985.

Before CUDAHY and COFFEY, Circuit Judges, and PELL, Senior Circuit Judge.

CUDAHY, Circuit Judge.

In 1970, Congress passed the provisions that form the basis of what we know today as the Clean Air Act. Pub. Law No. 91-604, 84 Stat.1676 *et seq.* (1970) (codified at 42 U.S.C. § 7401 *et seq.*). At the same time the Environmental Protection Agency ("EPA") was created by Executive Order. 35 Fed.Reg. 15623 (1970).

In 1977 Congress amended the Act, adding, among other things, a Part D: "Plan Requirements for Nonattainment Areas." §§ 171-178, 42 U.S.C. §§7501-08. The notion of a nonattainment area was a new one introduced with the 1977 amendments; the idea was to allow the construction of new facilities even in areas not in attainment with national standards for pollution, provided that certain conditions were met. It also required the imposition of certain controls—for example, inspection and maintenance programs for vehicles-in areas that continued to fall short of the standards after certain deadlines.

The standards were to be set by the EPA, and ways of determining attainment and nonattainment were also up to EPA. The states, on the other hand, were responsible for determining the geographic boundaries of the attainment and nonattainment areas, subject to EPA's approval; and they were also responsible for submitting to EPA, in 1978, a list of all such areas, with an indication, for each area, whether it was in attainment with respect to the standards. Since the standards were different for different pollutants, and since the appropriate size of the areas might differ for different pollutants, the states really submitted a number of lists, one for each pollutant. The EPA undertook to provide guidance as to the appropriate size of the areas for different pollutants, and was in a position to enforce those guidelines, since final approval of the lists rested with it.

When a nonattainment area reached attainment (according to EPA criteria), the state was entitled to revise and resubmit its list. If EPA agreed with the redesignation to attainment, it approved the revision. If it did not, it was required to turn down the request within a certain time period, to give reasons for the refusal and to invite comments before taking final action. (§ 107(5), 42 U.S.C. § 7407(5); § 107(2), 42 U.S.C. § 7407(2).)

In 1978 Illinois submitted its lists and they were approved. The list for ozone—or rather, at that time, for photochemical oxidants[1]—divided the Chicago urban area into counties, all of which were listed as nonattainment.

In 1983, Illinois revised the list to show that Will and McHenry Counties, two counties near Chicago, were in attainment, and EPA approved the change. A short time later Illinois proposed to upgrade Kane and Du Page Counties, two counties closer to the geographical center of Chicago. This time EPA denied the proposal. By way of explanation EPA did not claim that the counties had failed to meet the ozone standard; instead, EPA pointed to the ozone problem in the larger Chicago urban area. Appeals were taken (directly to this court under § 307(b)(1) of the Clean Air act, 42 U.S.C. § 7607(b)(1)) both by the Illinois Environmental Protection Agency, the agency entrusted with carrying out the state's part in the regulation process, and by the Illinois Chamber of Commerce.[2]

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[1]From 1971 to 1979 EPA set down standards for photochemical oxidants. In 1979 the standards were restated in terms of ozone, a major component of photochemical oxidants. 44 Fed. Reg. 8202 (1979).

[2]The Chamber brings this appeal on behalf of its members. EPA has argued that the Chamber has no standing. Clearly the possibility of losing highway funds and the likelihood of increased controls threaten an increase in the cost of doing business in Kane and Du Page Counties, and threaten directly to affect the Chamber's members. It appears to us, therefore, that the Chamber does have standing. Besides, we have already asked the Chamber and the Illinois agency to divide the issues between them rather than duplicating each other's briefs, and we would be obliged to consider the Chamber's arguments in any case, if only as *amicus curiae*.

I

Ozone is a significant component of the health-endangering smog that is one product of modern industry and transportation. Ozone can cause serious respiratory problems; when it reaches levels of moderate concentration in the air around us, normal men and women may begin to cough and may feel their chests tighten; they may begin to experience eye irritation; the very sensitive may have asthma attacks. At higher concentrations hospitalization becomes a possibility. Ozone is one of the substances that make up what we call air pollution, and Congress has given the Environmental Protection Agency the task of bringing it under control.

Ozone, unlike many other pollutants, is not discharged directly into the atmosphere by the offending source. Ozone production depends on the emission of volatile organic compounds[3] which, under the appropriate meteorological conditions, react to form ozone. Since this reaction requires a certain amount of time, ozone concentrations are typically not found overhead of the sources that produce them, but rather downwind.

This process of ozone formation is now rather well documented. Scientists were at first surprised to find ozone concentrations over remote rural areas; there was some speculation that nature itself might be responsible for these formations. But at least by the 1970s it was clear that ozone in rural areas was largely due to the airborne "transport" of ozone precursor chemicals—volatile organic compounds—together with meterological conditions that eventually would

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[3]The substances of which ozone is formed, known as ozone precursors, are oxides of nitrogen and organic pollutants. Oxides of nitrogen are formed as a result of fuel combustion from mobile and stationary sources. Organic pollutants are emitted primarily from mobile sources and manufacturing facilities. These precursors undergo photochemical oxidation in the presence of sunlight, and form ozone.

support the production of ozone. In general, ozone appeared to reach peak concentrations downwind of the sources.

Thus, studies carried on in 1973 showed that sources in Houston were responsible for ozone concentrations about 15-25 miles downwind, and showed similar, though not so pronounced, results in the Phoenix area. Martinez & Meyer, *Urban-Nonurban Ozone Gradients and Their Significance,* Symposium Paper, March 12, 1976 (reprinted in Appellee's Appendix at A-76). In 1974, peak values of ozone were found to arise 5 to 15 miles downwind of Columbus, Ohio. *Id.* A 1975 study of sites in the Pennsylvania and New Jersey areas tended to show that ozone concentrations would occur 27 to 49 kilometers downwind of the source areas. "This accounts for some of the ozone previously observed in the non-industrial, low-traffic density area of Ancora, N.J., where concentrations of primary pollutants are low, but where ozone daily maxima frequently exceed the federal standard. Thus, photochemical air pollution [ozone] in this area is a regional rather than a local phenomenon, and ozone resulting from emissions from the urban complex is widespread and not confined to the complex itself." Kleiner, *Transport of Photochemical Air Pollution,* 9 Environmental Science and Technology 886 (1975). *See also* EPA 600/3-77-017, Proceedings of a Symposium on 1975 Northeast Oxident Transport Study, Research Triangle Park, N.C. (1976); EPA, Mt. Storm, W.Va.-Gorman, Md.-Keyser, W.Va. Air Pollution Abatement Activity, No. APTD—0656 (April 1971).

Given these studies, it is natural to suppose that the Chicago-northwest Indiana area contributes much of the ozone pollution that occurs along the western shore of Lake Michigan; and indeed one study concludes that that is precisely the case: long Lake Michigan, through Milwaukee and beyond, "Chicago-northwest Indiana acts as a giant

volume source resulting in a significant fraction of the ozone monitored on alert-level days." Lyons & Cole, *Photochemical Oxidant Transport,* 15 J. Applied Meteorology 733 (1976). In 1976 hourly average values as high as .30 ppm (parts per million) (the national standard is now set at .12 ppm), with excursions above .40 ppm, recorded in southeastern Wisconsin were attributed by the study to sources in the Chicago area. Nevertheless, we will not, in this opinion, make any factual assumptions about the direction in which ozone is transported away from the Chicago area; our only assumption, one which is not denied by either party, is that ozone tends to show up at varying distances downwind from the source.

II

A.

Prior to the passing of the 1977 Amendments to the Clean Air Act, the EPA had developed an "offset" policy to moderate some of the harsh consequences of a state's failure to attain a standard set under the 1970 Act. 41 Fed.Reg. 55528-29 (1976); D. Currie, Air Pollution 6-2 (1981). Instead of prohibiting the construction of all new facilities in areas that had not attained federal standards, the EPA was prepared to permit such construction provided that the pollution produced by the new source was at least offset by reductions in emissions from existing sources. Because of the regional nature of the ozone problem, EPA advocated allowing ozone created by new sources to be offset by reductions anywhere within a large, urban, ozone-producing area. EPA, Effectiveness of Organic Emission Control Programs as a Function of Geographic Location (April 1977 memorandum) (reprinted in Appellee's Appendix at A-249). EPA saw little benefit from focusing VOC (volatile organic compounds) programs on urban areas with

fewer than 200,000 inhabitants; instead, ozone control was aimed at the larger areas. In the memorandum just cited, a map indicated the urban-ozone problem areas with shaded circles; Chicago and northwest Indiana were together in one large shaded area. Of the offset policy, the memorandum says that

> a major new VOC source locating within one of the shaded areas should be required to obtain emission offsets from existing sources *within that same area.*

Id. at 32 (emphasis in original). The assumption that the offset policy would apply in all urban areas—that is, the assumption that urban areas failed to meet the ozone standard (at the time, .08 ppm)—was not based on any monitoring of the air in those areas, but on general knowledge of the process of ozone production.

One important reason for the 1977 Amendments to the Clean Air Act was to provide a statutory basis for the offset policy. *See* D. Currie, *supra,* at 6-2. This Congress did by introducing the notion of a "nonattainment area." § 171, 42 U.S.C. § 7501. Each state was, with EPA approval, to provide a list dividing the state into areas—perhaps a different division for different pollutants—showing for each area whether it was in *attainment* of the standard for a certain pollutant; *nonattainment* of the standard; or as of yet *unclassifiable.* § 107(d)(1), 42 U.S.C. § 7407(d)(1). Within the nonattainment areas provisions of the statute based on the offset policy were to apply. *See, e.g.,* § 173, 42 U.S.C. § 7503.

It was up to the states to determine the appropriate geographic size of these areas; but EPA had to approve and promulgate the list, and it was up to EPA to offer guidance as to what sizes would be acceptable, and what sizes would not.

H.R. REP. No. 294, 95th Cong., 1st Sess., 1977 U.S. CODE CONG. & AD.NEWS 1077, 1292; § 107(d), 42 U.S.C. § 7407(d). For some pollutants, EPA discharged this duty with a fair amount of precision. Thus, for sulfur dioxide:

> Generally where EPA promulgated a designation for SO_2 the minimum area was to be the county in which the violating monitoring site was located.

And for carbon monoxide:

> A designation of nonattainment for the entire urban core area . . . was desirable, but smaller area designations were acceptable since CO violations are most pervasive in downtown areas. . . .

43 Fed.Reg. 8962-63 (1978).

But in the matter of ozone, perhaps because of the essentially different way ozone is produced, EPA gave no clear guidance. There was talk that suggested that an entire urbanized area should be considered one nonattainment area for ozone, because all of the sources in a city were assumed to contribute to the ozone problem in the area. 44 Fed.Reg. 20376 (1979); 43 Fed.Reg. 45997 (1978); 43 Fed.Reg. 8962 (1978). *See also* Raffle, Env.Rep. (BNA) Monograph #27 (1979) (most major urban areas in the U.S. designated as nonattainment areas); 9 Env.Rep.—Current Developments (BNA) 1812 (1979) (most cities nonattainment in spite of lowered standard). On that theory, the larger Chicago urban area should have been one nonattainment area; and yet when Illinois submitted its first list, the Chicago urban area was divided into counties, each county listed as—apparently—a separate nonattainment area. 43 Fed.Reg. 8962, 8988-89 (1978). EPA also advanced a slightly different theory, that a nonattainment

area for ozone must be large enough to include both the polluted area and all major sources of the ozone pollution in that area, a theory obviously rooted in the offset theory out of which the notion of a nonattainment area had come. *See* Memorandum from David Hawkins to Regional Administrators of USEPA, January 3, 1978 (reprinted in Appellee's Appendix at A-39) (for ozone, regional offices should require "that the designated area be of sufficient size to include most of the hydrocarbon sources"); 46 Fed.Reg. 55724 (1981) ("A nonattainment area should be as small as possible while encompassing all areas of expected violations and all sources of significant impact on those violations."); 48 Fed.Reg. 46084 (1983) ("[T]he designated nonattainment area should be of sufficient size to include most of the significant hydrocarbon . . . sources.") But it is clear that EPA never took that theory seriously. It never proposed that southeastern Wisconsin and Chicago be part of the same nonattainment area, for example, as it should have under the theory, if Chicago sources cause Wisconsin ozone. This theory is also inconsistent with the "urbanized area" theory, since on the urbanized area theory the peak ozone concentration area, miles downwind, would not be included in the nonattainment area for a city; but under the "polluted area plus sources" theory, it must be. Again, under this theory EPA should not have approved the division of the area into counties, since pollution in one county may be caused by sources in another. And finally, to top off the confusion, in 1983 EPA granted a change in status from nonattainment to attainment for Will and McHenry counties, 48 Fed.Reg. 21947 (1983); yet later EPA conceded that Will County, at least, contained significant sources of VOC emissions contributing to ozone pollution in the Chicago area. 49 Fed.Reg. 24130 (1984). If sources are to be in the same nonattainment area as the pollution they produce, Will County ought to be in the Chicago nonattainment area.

We might have supposed that EPA was not serious about either theory, having allowed Illinois to treat the separate counties in the Chicago metropolitan area as separate non-attainment areas, if it were not for the EPA action that gives rise to the present litigation. For EPA has refused to upgrade two counties in the Chicago area, in spite of the fact that no violations have been monitored in those counties.

B.

Section 107(d)(5) of the Clean Air Act, as amended in 1977, permits states to propose a revision in the status of nonattainment areas to the EPA:

> A State may from time to time review, and as appropriate revise and resubmit, the list required under this subsection. The Administrator shall consider and promulgate such revised list in accordance with this subsection.

42 U.S.C. § 7407(d)(5). A change in status is called for when an area is in attainment with the national standard set by EPA. For ozone the following standard applies:

> The level of the national primary and secondary ambient air quality standards for ozone . . . is 0.12 part per million. . . . The standard is attained when the expected number of days per calendar year with maximum hourly average concentrations above 0.12 parts per million is equal to or less than one. . . .

40 C.F.R. § 50.9 (1979). As proof of attainment EPA requires data showing no violations over the previous year, or on the average less than one full day in violation per year, over three

years. Violations are measured at monitoring sites. *Guidelines for the Interpretation of Ozone Air Quality Standards* (EPA 450/4-79-003).

In January, 1983, Illinois submitted a revised list in which Kane and Du Page Counties each would have been upgraded to attainment status for ozone, along with data showing that no violations had been monitored in those counties. EPA refused to approve the change. In the proposed rulemaking that denied Illinois' request, EPA said:

> Because the prevailing winds during the ozone season are from south through west, ozone precursor emissions from DuPage and Kane Counties can contribute significantly to ozone NAAQS [national ambient air quality standards] exceedances which continue to be observed in the Chicago area.... These counties must continue to be considered as part of the Chicago urbanized ozone nonattainment area for the purpose of the 1982 [state implementation plan].

48 Fed.Reg. 46084. Later, in the final rulemaking, answering objections raised by the state, EPA continued to rely on two separate theories, first, that a nonattainment area must include all the sources that contribute to pollution in that area; and second, that an urban ozone nonattainment area must include the entire urbanized area:

> [I]t is important that the nonattainment areas be of sufficient size to include all emissions sources . . . which contribute significantly to the violation of NAAQS.

49 Fed.Reg. 24130.

> EPA's determination is based upon the fact that these counties are part of major urbanized areas....

49 Fed.Reg. 24130. As we have pointed out already, these theories are not only apparently inconsistent with one another (the first would require Chicago sources to be part of the southeastern Wisconsin nonattainment area, if EPA meteorological information is right, whereas the second evidently would not), they are both inconsistent with the action EPA took in originally approving the Illinois ozone list for the Chicago area by counties.

Illinois, having gotten its list by counties approved in 1978, and having gathered data to show that two of the original nonattainment areas, Kane and Du Page Counties, are now in attainment, brings this appeal to protest the EPA action. (Although separate actions were brought by the Illinois Environmental Protection Agency and the Illinois Chamber of Commerce, for simplicity we will treat their arguments together as arguments of the Illinois litigants.) Illinois argues that, since no violations have been monitored in Kane or Du Page Counties, and since those counties have been approved as separate attainment-nonattainment areas, EPA is either basing a nonattainment status for those areas on air quality monitored in other areas; or else it is now trying to change the borders of the nonattainment areas to make all of the Chicago area—including Kane and Du Page Counties—one nonattainment area. If it is doing the first, the state argues, then it is doing something not authorized by the statute, which authorizes the EPA to use only local air quality to determine the status of an area; and in addition, according to Illinois, EPA has not shown that emissions in Kane and Du Page actually contribute to the ozone problem in the core Chicago area and downwind. If, on the other hand, it is trying to change the borders, then under *Bethlehem Steel v. EPA*, 723 F.2d 1303 (7th Cir. 1983) (as Illinois reads it), it is doing something it may

not do. As the state sees it, EPA's authority over the boundaries of nonattainment areas is limited to modifying changes in those boundaries proposed by the states, and does not extend to changing the boundaries when the state has proposed a change in attainment status.

C.

Since the statute does not require a hearing before EPA promulgates a rule denying a state's redesignation request, the proper standard of review, under § 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), is the "arbitrary and capricious" standard.

In this case EPA announced a proposed rulemaking that was apparently in conflict with earlier decisions. EPA is entitled to change its policy, but it must do so on the basis of a reasoned analysis. *Motor Vehicle Manufacturers Assoc. v. State Farm Mutual Automobile Ins.*, 463 U.S. 29, 57, 103 S.Ct. 2856, 2874, 77 L.Ed.2d 443 (1983). If EPA changed its policy, it did not say so; and neither did it explain how its justification of its most recent action could be made consistent with its earlier actions, if no change in policy was involved. It must do one or the other. If it has changed its policy, it must explain how and why; if it has not, it must articulate an explanation that will account for both the earlier and the most recent actions it has taken. Until it has done one or the other, its actions will appear to be arbitrary, and rational review in this court will be impossible.[4]

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[4] The Chamber of Commerce argues that EPA did not follow proper procedures, and that redesignation proceedings must include a formal hearing. It argues that such proceedings are adjudications rather than rulemaking, and thus are subject to the requirements of 5 U.S.C. § 554(c), which requires an agency to provide opportunity for a hearing. Section 554 in which a hearing is required by statute. The Clean Air Act

III

We are aware of at least four different ways in which EPA might justify the action it has taken. Each is more or less consistent with the available evidence concerning ozone; but each is also inconsistent with something EPA has said or done in the past. It is not our duty, in reviewing EPA's action, to pick and choose among the various justifications that might be given. *State Farm,* 463 U.S. at 43, 103 S.Ct. at 2866. We feel obliged, however, to say enough about the various theories to show how they fall short of making a recognizable pattern out of the pieces in this puzzle, and to suggest how those shortcomings might be remedied.

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does in the case not require a hearing for redesignation proceedings. It is true that an "opportunity for the oral presentation of data" must be given to interested parties in the case of proceedings that fall under § 307 of the Clean Air Act, 42 U.S.C. § 7607(d)(5) but a § 107 redesignation proceeding is not one that falls under § 307 by the terms of that section. Thus redesignation proceedings would not require hearings ("oral" hearings) even if they were adjudications.

Moreover, there is no good reason to think that these proceedings must be considered adjudications. The Administrative Procedure Act defines "rule" to mean any statement "of general or particular applicability and future effect designed to implement, interpret or prescribe law or policy." 5 U.S.C. § 551(4). That description seems to fit not only "statements" that issue from designation proceedings, *see* D. Currie, Air Pollution 6-8 n. 9 (1981), but those that issue from redesignation proceedings as well. It is true, as the Chamber points out, that we said in *U.S. Steel v. EPA,* 605 F.2d 283, 285-86 n. 3 (7th Cir. 1979), that the question whether designation proceedings were rulemaking was "not without difficulty;" our concern there, however, was whether designations might be merely preliminary proceedings, governing the future formulation of actual regulations concerning the designated areas, and thus not subject even to the notice and comment requirement. Thus, we cited *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971), as involving an analogous proceeding that the Supreme Court held did not rise to the level of rulemaking. The problem in *U.S. Steel* was thus not whether to require *more* procedure than notice and comment, but whether even that much was required. In the end we did not decide the issue because the EPA, in calling the proceeding a rulemaking, had brought itself under the requirement to provide notice and the opportunity to comment. To suppose that *U.S. Steel* decided that these proceedings should be considered adjudications, or that we even considered the question in that opinion, is to misread the opinion and to suggest how those shortcomings might be remedied.

Although the choice of a theory rests ultimately with EPA, we have already seen that one of these theories does not have much to recommend it: the theory which would make a polluted area, together with all areas containing sources contributing to pollution in that area, one nonattainment area. For one thing that theory does not explain the original division into counties, or the separate upgrading of Will and McHenry Counties, acknowledged sources of pollution in the Chicago area. For another thing, in the case of ozone the areas would have to be large; and since ozone pollution occurs downwind of the sources, in some cases the polluted area itself might contribute nothing to the pollution. It should be within EPA's discretion to allow the upgrading of such areas (something it could not do if both the polluted area and the source made up one nonattainment area). Moreover, our beliefs about the movement of ozone and ozone precursors are subject to revision, as the environment and our knowledge of the environment changes; but the limits of a nonattainment area ought not to be subject to constant revision. And finally a look at the boundaries originally approved by EPA in the eight largest metropolitan areas shows that, with the exception of the Chicago area, the boundaries were large enough in each case to include the entire urbanized area, but that no attempt was made to draw up the boundaries in such a way as to track the movement of ozone away from the sources, as this theory would require. 40 C.F.R. §§ 81.333 (New York), 81.305 (Los Angeles), 81.314 (Chicago), 81.339 (Philadelphia), 81.323 (Detroit), 81.305 (San Francisco), 81.322 (Boston), 81.309 (Washington, D.C.). Hence the theory fails to explain not only what EPA did in the Chicago area, but what it did in those other areas as well.

The remaining three theories are more plausible. On the assumption that EPA *did* approve the counties as separate nonattainment areas in 1978, EPA may now be arguing that

ozone attainment must be determined at monitors downwind and outside the area itself; or EPA may be arguing that attainment of the ozone standard is to be determined on the basis of ozone *precursors* monitored within the area itself. Both these theories are consistent with EPA's desire to make the source area a nonattainment area, without involving the apparently unworkable notion that a polluted area together with all its sources must make up one nonattainment area. Under either of these theories, the present county boundaries remain the boundaries of the nonattainment areas in Chicago, but the attainment status of those areas will depend on ozone pollution elsewhere.

On the other hand, EPA may be arguing that it never approved the division of the area into counties, and that Kane and Du Page are part of a unitary Chicago nonattainment area. This theory requires an explanation of the original listing, and for the fact that Will and McHenry Counties, arguably part of the larger Chicago area, were upgraded individually.

The first of the theories—that attainment of the standard in one area may be determined by the presence of ozone in another area—is not inconsistent with the statute. The relevant provision is a definition:

> The term "nonattainment area" means, for any air pollutant, an area which is shown by monitored data or which is calculated by air quality modeling (or other methods determined by the Administrator to be reliable) to exceed any national ambient air quality standard for such pollutant.

§ 171(2), 42 U.S.C. 7501(2). Nothing in the statute says that monitoring must be done within the area itself; indeed, the facts suggest that the best, and perhaps only, way to monitor

for ozone would be to monitor downwind. (The word "ambient" is defined in the statute to mean roughly the same as "outdoor," it does not carry the connotation of "local.") Since the statute gives the Administrator a certain amount of discretion ("other methods determined by the Administrator to be reliable"), and since other provisions of the Act do not limit that discretion, it would seem to be within the authority of the agency to monitor ozone production at sites downwind.[5]

EPA has not set down standards for this sort of off-location measuring, however; existing guidelines suggest a determination of status by means of monitoring within the area. *See* Guideline for the Interpretation of Ozone Air Quality Standards (EPA 450/4-79-003). If EPA has something different in mind, it should make clear how ozone pollution is to be measured downwind, and that is something it so far has not done.[6]

Something similar is true of the second theory, which would base attainment status on the measurement of ozone precursors within the area itself: as the monitoring guideline is currently written, it is written in terms of ozone, and not ozone precursors.

Nevertheless, the guidelines are within the power of EPA to change. The current state of scientific knowledge suggests that it would be worse than foolish to start with geographically small areas, for ozone, and then base the attainment status of

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[5] Among the virtures of this theory is the fact that it would reserve the decision about the boundaries primarily to the state, and the decision about monitoring methods primarily to the EPA.

[6] In its Brief, EPA claims to have relied on monitoring sites in areas downwind of Kane and Du Page Counties (Deerfield, Ill.; Libertyville, Ill.; Evanston, Ill.; Skokie, Ill.; Kenosha, Wis.; and Racine, Wis.), all of which recorded violations of the ozone standard between 1980—82. No general criteria for selecting sites downwind have ever been suggested, however.

each area on the monitoring of ozone within that area. Attainment and nonattainment are meant to reflect the contribution of an area to the pollution problem; and perhaps the *worst* way to determine the contribution of a small area to the ozone problem is to measure for ozone within the area itself. It cannot have been the intention of Congress that EPA choose the worst possible way to measure for the production of pollutants, and nothing prevents EPA from changing its guidelines to reflect one of these views.

What we have said so far is on the assumption that EPA in fact approved a division of the Chicago area into counties. As we will see, that is not so clear as Illinois would have us believe. EPA has argued, and we find the argument persuasive, that although the Chicago area is listed by counties, it has been clear all along that insofar as any county was part of the urbanized area or its fringe of development it was to be part of a single nonattainment area, not to be upgraded until the entire area reached attainment.

Suppose, for example, Illinois had submitted the original list with Du Page County marked as "attainment" because monitors had shown no violations. It is clear as these things can be that EPA would have disapproved the rating, on the grounds that Du Page was, for purposes of ozone pollution, part of the larger Chicago area. That is precisely what happened with Porter County, Indiana. When EPA solicited comments on the original list, there was an objection to the nonattainment status of Porter County in northwest Indiana. In its reply, EPA did not allege that there had been monitored violations in Porter; instead, it said:

> The nonattainment designation of Porter County was based on the fact that portions of Porter County are part of the Chicago-northwest Indiana urbanized area.

43 Fed.Reg. 45997 (1978). EPA, as we have seen, had suggested that all urbanized areas were to be treated as units, for ozone, and were to be assumed at the outset not to have attained the standard.

Thus, the original listing by counties was very possibly no more than an accident of record-keeping. Congress demanded a list from the states. The EPA asked the states to treat urban areas as unitary nonattainment areas for ozone, as it was authorized to do. Illinois submitted a list, by counties, in which all the counties in the Chicago urban area—and thus the urban area itself—were listed as not in attainment. Although such a list, out of context, is ambiguous between the two interpretations—is Chicago one area consisting of the listed counties, or is each county a separate area? —the circumstances surrounding the promulgation of the list suggest that EPA's interpretation may be the proper one. When EPA proposed to turn down the request to upgrade Kane and Du Page Counties, it used language that echoed the 1978 comment explaining Porter County's status:

> Because the prevailing winds during the ozone season are from south through west, ozone precursor emissions from DuPage and Kane counties can contribute significantly to ozone NAAQS exceedances which continued to be observed in the Chicago area.... These counties must continue to be considered as part of the Chicago urbanized ozone nonattainment area for the purpose of the 1982 SIP.

48 Fed.Reg. 46084. If we could be certain that this was indeed EPA's practice all along, we would be unwise to reverse agency action on the basis of the happenstance of a particular way of listing the Chicago urban area in a 1978 list. This "urbanized area" theory would also explain the different

treatment of Will and McHenry Counties which, although EPA concedes they contain significant sources of ozone precursors, do not—unlike Kane and Du Page County—contain any part of the Chicago urbanized area, as defined by EPA on the basis of the 1970 census.

While this last theory may be the least problematic under existing standards, it suffers from problems of its own. Although large cities are prime contributors to the problem of ozone, so that it makes sense to impose ozone controls on them, there remains the question of how the attainment status of an urban area is to be changed. Will it depend on monitoring within the area itself? For reasons we have explained, a good deal of the ozone created in the Chicago area apparently finds its way downwind into Wisconsin. Although making the area larger reduces the problem—much of the ozone is also found within the urban area itself—the theoretical basis for monitoring for ozone only within an urban area as defined by the census is not presently clear enough to allow for proper review of EPA's action in this Court.

IV

Illinois argues that there are other ways for EPA to do what it feels must be done without denying Illinois' application to upgrade Kane and Du Page Counties. The fact that the parties have brought this litigation to the court of appeals shows that neither side believes that any of the alternatives will provide exactly equivalent results. If EPA could get the same results without blocking the upgrading of Kane and Du Page Counties, then Illinois would have nothing to gain, and EPA nothing to lose, however the appeal came out. Clearly the outcome of the appeal does make a difference; for one thing, certain controls apply to nonattainment areas by operation of the statute. It is essential to the success of the Clean Air Act

that these controls apply in the appropriate areas, and we refuse to construe the law in such a way that the controls will apply to areas that suffer from but do not produce ozone pollution but not to areas that produce but do not suffer from such pollution. The automatic imposition of controls gives EPA a certain leverage over the states, and we think such leverage should be available where, but only where, it will be useful.

Moreover, since *Bethlehem Steel* it has been clear that if these areas are mistakenly upgraded, the EPA will not be able unilaterally to return them to their nonattainment status. The consequences of a mistaken upgrading are extremely serious, therefore, and we cannot treat the revision process as a game which EPA must lose if it has failed on a previous occasion to be clear about its rationale. The states are entitled to a clear understanding of how areas will be evaluated; but Congress clearly did not intend technical missteps to defeat EPA's ability to implement the best of current opinions about the nature of pollution.

The state suggests that we vacate, and, since the record supports redesignation, reverse the decision of the EPA. It is not true that the record supports redesignation; but since EPA has not made clear the rationale for its action, and since certain of the possible rationales rely on empirical assumptions that should be subjected to the give and take of notice and comment we therefore vacate the decision in its present form and remand for further proceedings consistent with this opinion. *State Farm, supra; Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade,* 412 U.S. 800, 93 S.Ct. 2367, 37 L.Ed.2d 350 (1973).

Our remand is for reconsideration by EPA and for clarification of the grounds upon which it has dealt or will deal

with the Illinois request. EPA will, of course, give Illinois an appropriate opportunity to respond.

COFFEY, Circuit Judge, dissenting.

The majority concludes that the Environmental Protection Agency ("EPA") acted arbitrarily and capriciously in failing to adequately explain its basis or theory in denying Kane and Du Page Counties' request to be reclassified from a status of nonattainment to one of attainment. To support its position, the majority posits several theories (i.e. urban v. county designation) that may explain the EPA's denial of Kane and Du Page Counties' redesignation request; and the majority argues that the EPA has failed to consistently apply either of these alleged theories in defining what constitutes an appropriate nonattainment area. Because the majority believes that the EPA failed to consistently apply the same theory in assessing the requests for redesignation, it remands this case to the EPA for further explanation. After reviewing the previous statements issued by the EPA concerning the appropriate size for nonattainment areas and the reason proffered by the EPA for denying Kane and Du Page Counties' request for redesignation—namely, that Du Page and Kane Counties are within the Chicago urban ozone area and contribute to the urban area's ozone problem—it is clear that the EPA has applied the same theory in assessing a request for redesignation from nonattainment to attainment. Specifically, the theory applied by the EPA is that the entire Chicago urban area is considered to be one nonattainment zone and that Kane and Du Page Counties are within that nonattainment zone for purposes of assessing their redesignation requests. Since the EPA has consistently applied the theory that the entire Chicago urban area is considered one nonattainment area, there is no reason to remand this case to the EPA to clarify its ruling. Thus, I respectfully dissent.

This court's standard of review of a federal agency decision was most recently stated in *Motor Vehicle Mfrs. Assn. v. State Farm Mut.*, 463 U.S. 29, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

> "The scope of review under the 'arbitrary and capricious' standard *is narrow and a court is not to substitute its judgment for that of the agency.* Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.' ...In reviewing that explanation, we must 'consider whether the decision was based on a consideration of relevant factors and whether there has been a clear error of judgment.' ...Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. The reviewing court should not attempt itself to make up for such deficiencies; we may not supply a reasoned basis for the agency's action that the agency itself has not given.... *We will, however, 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'"*

Id. at 43, 103 S.Ct. at 2866 (citations omitted) (emphasis added). The theory the EPA employed in denying Kane and Du Page Counties' request for redesignation—that Kane and Du Page Counties are part of the Chicago urban area and will be considered to be in nonattainment until the Chicago urban area achieves attainment—can certainly be "reasonably discerned" from the record.

I

Congress passed the Clean Air Act in 1970 and established a combined state and federal program to control air pollution. *See* Pub.L. No. 91—604, 84 Stat. 1676 *et seq.* 1970. As part of this program Congress required the EPA to establish a National Ambient Air Quality Standard ("NAAQS"), *see* sections 108 and 109, and required that each state adopt and submit a "state implementation plan" ("SIP") to the EPA designed to attain the NAAQS in the designated Air Quality Regions ("AQCRs"), section 107(b)-(c), 42 U.S.C. § 7407(b)-(c). Attainment of the NAAQS was to be achieved by 1977. Currie, *Air Pollution,* § 6—1 (1981). It became apparent, however, that many of the AQCRs would not meet the deadline for compliance with the Clean Air Act. *Id.* at 62. Thus, in 1977 Congress added subsection (d) and (e) to Section 107 of the Act. *See* 42 U.S.C. § 7407(d) and (e). Subsection (d) provides that states "submit to the Administrator a list, together with a summary of the available information, identifying those air quality control regions, or portions thereof," that either satisfy the NAAQS ("attainment"), failed to satisfy the NAAQS ("nonattainment") or could not be classified because of a lack of information. Nonattainment was defined as "an area which is calculated by air quaity modeling ... to exceed any national ambient air quality standard...." Section 171, 42 U.S.C. § 7501.[1] Each state was required to submit to the EPA a list of those air quality control regions or AQCRs that failed to comply with NAAQS; the EPA was then to promulgate the list within sixty days of receipt "with such modifications as he [the Administrator] deems necessary." 42 U.S.C. § 7407(d)(2). For those areas listed as nonattainment, Congress provided that the

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[1] In 1979, the EPA revised the federal chemical oxidant NAAQS and relaxed the standard from 0.08 part per million ("ppm") to 0.12 ppm and changed the chemical designation of the standard from photochemical oxidants to ozone. 40 C.F.R. § 50.9 (1984).

SIPs were to provide for incremental emission reductions from existing sources in the nonattainment area. 42 U.S.C. § 7502(b)(3). The reductions in pollutants could be achieved through "reasonably available control technology," *id.*, and through permits restricting the construction and operation of new sources of pollutants in the nonattainment area. 42 U.S.C. §§ 7502(b)(6) and 7503.

In line with these regulations, Illinois in 1978 submitted to the EPA, and the EPA promulgated, a list of nonattainment areas. This list included, among others, Cook, Lake, Du Page, Kane, Will, and McHenry Counties. Indiana also submitted its list to the EPA of nonattainment areas that included Porter and Lake Counties in Indiana. Porter and Lake County, Indiana are located along the southern short of Lake Michigan adjoining the Illinois border. Cook and Lake Counties, Illinois are located on the western shore of Lake Michigan just northwest of Lake and Porter Counties, Indiana, while Du Page and Kane Counties are located southwest of Lake County and immediately west of Cook County, Illinois. The County of Will is located south of Cook County while McHenry County is located north of Kane and Du Page Counties.

On January 27, 1983, the State of Illinois requested that the EPA redesignate Kane and Du Page Counties from nonattainment to attainment status. To support its request, Illinois noted that the ozone monitors located within those counties had registered no violations of the NAAQS for a three-year period. In its proposed ruling, the EPA denied the redesignation request reasoning that Kane and Du Page Counties were part of the Chicago urban area and contributed to the ozone problem in the Chicago urban area because of the prevailing southwest winds during the summer months.

"However, U.S. EPA has determined that the high population densities in DuPage and eastern Kane Counties are associated with relatively high densities of area and mobile source volatile organic compound emissions. Because the prevailing winds during the ozone season are from south through west, ozone precursors emissions from DuPage and Kane Counties can contribute significantly to ozone NAAQS exceedances which continue to be observed in the Chicago area. U.S. EPA, therefore, proposes to reject the Illinois proposal to redesignate Kane and DuPage Counties to attainment for ozone. These counties will continue to be designated nonattainment until sufficient data is available to warrant a change. *These counties must continue to be considered as part of the Chicago urbanized ozone nonattainment area for the purpose of the 1982 SIP.*"

48 Fed.Reg. 46082, 46084 (1983). After Illinois submitted comments on the proposed ruling, the EPA, on June 12, 1984, issued its final ruling and denied the state's request that Kane and Du Page Counties be redesignated to an ozone attainment status.

II

The majority holds that the EPA's action in denying Kane and Du Page Counties' request for redesignation from nonattainment to attainment is arbitrary and capricious as the EPA has failed to set forth a consistent theory in approving the boundaries for the nonattainment areas. Essentially, the majority argues that the EPA has been less than consistent in its decision of whether the nonattainment boundaries should be determined on a county or on an urban wide area basis. Specifically, the majority observes that in 1978 the EPA approved a list submitted by Illinois designating the counties in the Chicago area as nonattainment. The majority next notes that the reason Du Page and Kane Counties were denied redesignation to attainment status was that monitors downwind from these counties in the Chicago urban area have been registering ozone violations. The majority concludes that if the EPA considers the county to be the area unit for defining attainment/nonattainment status and these counties are to be held responsible for ozone measured downwind and outside the county boundaries, the EPA should clarify the standards as to when the county is to be held accountable for ozone outside its borders.[2] On the other hand, the majority observes that the EPA may have considered the entire urban Chicago area as one nonattainment area (as all the counties within the urban area were listed as nonattainment), but that this designation is inconsistent with the EPA's approval of Illinois' list of nonattainment areas defined on a county basis. Thus the majority concludes that if the EPA has changed its policy as to how it defines the attainment/nonattainment area "it must explain how and why; if it has not it must articulate an

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[2] Presently, the guidelines indicate that the status of whether an area is considered attainment or nonattainment is determined by monitors located within the designated nonattainment area. *See* Guidelines for the Interpretation of Ozone Air Quality Standards (EPA 450/4-79003).

explanation that will account for both the earlier and the most recent actions it has taken."

After reviewing the various statements and rulings issued by the EPA since 1978—the year that the states were to submit a list of those areas it considered to be in nonattainment—the record is clear that the EPA has consistently followed the same policy in assessing a redesignation request from counties located in the Chicago urban area: that any county in the Chicago urban area contributing to the Chicago urban area's ozone problem will remain in nonattainment status until the Chicago urban area problem of ozone is adequately controlled and thus reaches attainment status. In denying Kane and Du Page Counties' request for redesignation, the EPA stated:

> "Kane and DuPage counties are *part of the Chicago urbanized area* and are therefore to be considered nonattainment until the greater Chicago area and its downwind peak impact areas are designated as attainment. *This is consistent with EPA's designation policy for ozone as outlined in the January 3, 1978 memorandum from David G. Hawkins, Assistant Administrator for Air and Waste Management entitled 'Attainment/Nonattainment Status Designations'....*"

49 Fed.Reg. 24128, 24130 (1984) (emphasis added). The Hawkins' memo discusses the appropriate size of the attainment/nonattainment areas.

> *"Priority should be given to those 105 urban areas with populations greater than 200,000.* These areas are to be considered nonattainment for oxidants unless monitored data supports attainment.... If a

> state fails to designate any of these areas or submits unacceptable designations, the Regional Office should make the required designations. *The Regional Office requires that the designated areas be of sufficient size to include most of the significant hydrocarbon sources."*

See Memorandum from David Hawkins to Regional Administrators of USEPA, January 3, 1978 (reprinted in Appellee's Appendix at A-39) (emphasis added). Thus, for the past seven years, as far back as 1978, it has been the EPA's position that the entire urban area should be designated as nonattainment, including in this area the significant sources of hydrocarbon precursors. This position is also reflected in the comments that the EPA made when it promulgated the list of nonattainment areas that the states submitted to the EPA: "There are 105 urban areas in the United States with populations greater than 200,000. *These major urban areas ... are where the oxidant problem is most severe."* 43 Fed.Reg. 8962-63 (1978) (emphasis added). Further, in 1978, Porter County, Indiana, a part of the Chicago urban area, requested that it be classified as in attainment with the NAAQS; the EPA, however, denied this request noting "[t]he nonattainment designation of Porter County was based on the fact that portions of Porter County are part of the Chicago-northwest Indiana *urbanized area."* 43 Fed.Reg. 45997 (1978) (emphasis added). Finally, in its proposed ruling, denying redesignation of Kane and Du Page Counties, the EPA observes that:

> "DuPage and eastern Kane Counties are associated with relatively high densities of area and mobil source volatile organic compound emissions. Because the prevailing winds during the ozone season are from south through west, ozone precursors emissions from DuPage and Kane Counties can

> contribute significantly to ozone NAAQS exceedances which continue to be observed in the Chicago area.... *These counties must continue to be considered as part of the Chicago urbanized ozone nonattainment area....*"

48 Fed.Reg. 46084 (1984) (emphasis added). Thus, since 1978 the EPA has been concerned that the entire Chicago urban area be considered one nonattainment area for purposes of determining whether the NAAQS has been satisfied. This areawide designation is consistent with the EPA's attempt to control the ozone problem. Ozone is an area wide, multi-chemical phenomenon that depends upon the transformations of VOC or hydrocarbon precursors under varying meteorological conditions. *State of Texas v. Environmental Protection Agency*, 449 F.2d 289, 293 n. 1 (5th Cir. 1974), *cert. denied*, 427 U.S. 905, 96 S.Ct. 3191, 49 L.Ed.2d 1199 (1976).[3] Since science to date has been unable to make exact predictions concerning the transportation of ozone, the designation of an area sufficient in size to control the ozone problem is well within the discretion and expertise of the EPA. *See Citizens Against Refinery's Effects v. Environmental Protection Agency*, 643 F.2d 183, 186 (4th cir. 1981).

The majority notes that the EPA may have been inconsistent in the theory it applies to determine the appropriate nonattainment area as the State originally submitted, and the EPA approved, a list of nonattainment areas based upon the counties boundaries. As the majority concedes, at the time the state submitted its original list to the EPA all counties in the Chicago urban area were listed as nonattainment; and thus the EPA approval of this list does not demonstrate in and of

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[3] VOC or hydrocarbon precursors are those emissions from smokestack industries and automobiles that when mixed with oxygen and sunlight under the right meteorological conditions help to create ozone. *State of Texas*, 499 F.2d at 293 n. 1.

itself that the EPA approved the nonattainment status of this area on a county basis. I would agree with the majority that remand for clarification of the grounds upon which the EPA evaluates a redesignation request would be proper if the approved state list was the only evidence in the administrative record in this case as to the previous action taken by the EPA in approving nonattainment areas. However, as discussed earlier in this dissent, the reports and comments issued by the EPA since 1978 demonstrate that the EPA considered the urban area, sufficient in size to contain the major sources of the VOC precursors, to be the proper size for determining the boundaries of the nonattainment/attainment zone. *See* 43 Fed.Reg. 8962 (1978); 43 Fed.Reg. 45997 (1978); Memo from David Hawkins to Regional Administrators of USEPA, (January 3, 1978) (Appellee's Appendix at A-39). Thus, it is clear that the EPA never intended to consider the attainment/nonattainment status of the Chicago urban area on a county basis, but rather the EPA considered the entire Chicago urban area as one nonattainment zone.

The majority also notes that the EPA's theory that the entire Chicago urban area is to be considered as one nonattainment zone is inconsistent with several EPA statements that sources of the ozone pollution must be included within the nonattainment area. *See* Majority opinion at 12 citing 48 Fed.Reg. 46084 and 49 Fed.Reg. 24130. To support this position the majority argues that peak ozone concentrations may be miles downwind from the source, yet under the urbanized area theory these areas would not be included within the nonattainment zone since these areas may not be considered, under the urban area theory, to be part of the nonattainment area because of their rural setting. For example, the majority argues that for the EPA to be truly consistent in its theory that sources of the ozone are to be included within the nonattainment zone, the counties in

southeast Wisconsin must be considered as part of the Chicago urban area for nonattainment purposes since the Chicago area contributes or is a source of ozone in southeast Wisconsin; yet, the EPA does not consider southeastern Wisconsin a part of the Chicago urban area nonattainment zone.[4] The majority's analysis completely misses the point. The EPA, as demonstrated in David Hawkins' memo in 1978 that suggests the appropriate size for the nonattainment area, was primarily concerned with controlling ozone in *urban* areas.[5] *See also* 43 Fed.Reg. 8962 (1978); 43 Fed.Reg. 45997 (1978). In order to reach its goal of attaining compliance with the NAAQS, the EPA suggested that the urban area nonattainment zone include the sources of the ozone (i.e. VOC precursors). The EPA clearly did not intend that rural areas (those with less than a population of 200,000) be considered as part of one massive nonattainment designation simply because ozone from large metropolitan areas may be blown into or effect the rural areas;[6] rather, the EPA was concerned with controlling ozone in the urban area and the best method to reach this goal was to include the sources of the ozone affecting the urban area's air quality within a single nonattainment zone. *See Western Oil & Gas Assoc. v. EPA*, 767 F.2d 603 (9th Cir. 1985).[7]

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[4] It should be noted that we have no knowledge to date of the EPA approving single nonattainment areas across state boundary lines.

[5] As noted by Mr. Hawkins, "[P]riority should be given to those 105 urban areas with populations greater than 200,000."

[6] *See* Hawkins Memo, *supra*, noting that the approved designation zone for rural areas could be based upon county boundaries.

[7] *See also* Memo from David Hawkins, Assistant Administrator for Air and Waste Management, January 3, 1978 (Appellee's Appendix at A-39) ("Priority should be given to those 105 urban areas with populations greater than 200,000. These areas are to be considered nonattainment for oxidants unless monitored data supports attainment ... the Regional Office should require that the designated area be of sufficient size to include most of the significant hydrocarbon sources.") (oxidant is a

Further, the fact that the EPA previously approved of the redesignation request of Will and McHenry Counties Illinois from nonattainment to attainment status fails to reach that quantum of legal reasoning to convince me that the EPA has acted arbitrarily and capriciously in denying Kane and Du Page Counties' request for redesignation. In rejecting Illinois argument that Kane and Du Page Counties should be approved for redesignation simply because Will and McHenry Counties were previously approved for redesignation on the basis that ozone monitored within those counties were within the NAAQS, the EPA noted:

> "The main reason EPA concurred with Illinois' redesignation request for McHenry and Will Counties was that these areas contained essentially none of the Chicago urbanized area or adjacent fringed areas of development. EPA was aware of the significant VOC emissions for Will County. It was determined that these emissions were dominated by stationary source emissions. These emissions have been and willcontinue to be significantly reduced as a result of Illinois RACT Regulations." 49 Fed.Reg. 24128, 24130 (1980).

The population of both Will and McHenry Counties was less than 200,000 during the period the EPA approved their redesignation to attainment status.[8] Thus, the EPA decision

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technical term for ozone); Memo from Helms, Chief Control Programs Operations Branch, March 5, 1984 ("In general, nonattainment areas should be large enough to include both the areas where the monitored violations occur and the areas where the sources causing these violations are located. The urbanized area should be the minimum size for ozone.... As you know, this reflects EPA's policy since the first Section 107 designations were made on March 3, 1978 (43 F.R. 8962-9059)").

[8] *See* Chart of Populations of Urbanized Areas: 1970 and 1960 (Appellee's Appendix at A-485) (listing the populations of Will and McHenry Counties as less than 200,000 people).

to approve the redesignation of Will and McHenry Counties was consistent with its policy that counties with a population of less than 200,000 people were not considered to be part of the urban nonattainment area as defined in the 1970 census.[9] In contrast, both Kane and Du Page Counties' populations are greater than 200,000 people, and both are sources of ozone precursors that contribute to the ozone in the Chicago urban area. Thus, the fact that the EPA had previously approved the redesignation of Will and Kane Counties does not mean that the EPA has not acted consistently in applying its policy that those counties within the urban area of Chicago would be considered as part of one nonattainment area.

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[9] Memo from David Hawkins, Assistant Administrator for Air and Waste Management, January 3, 1978 (Appellee's Appendix at 39) (Noting that for those areas whose population does not exceed 200,000 the "county should be designated as a minimum [for purposes for designating a nonattainment zone] unless the county is exceptionally large and the extent of the violations is minimal.") Letter from Darryl Tyler, Director Control Programs Development Division, March 2, 1984, (Noting that for ozone the area of nonattainment must include the urbanized area "as defined by the U.S. Bureau of Census" and other fringe areas with significant volatile organic compound sources).

In its brief, the EPA admits that if anything it may have made a mistake in redesignating Will County because the businesses within that county do contain a large number of stationary VOC sources. The EPA notes, however, that in redesignating Will County it acted in a consistent manner with its policy that those areas not considered to be part of the urban area could have the attainment/nonattainment boundaries defined by their county borders. Moreover, the EPA believed that it had the authority to redesignate Will County as nonattainment if Illinois failed to promulgate and enforce the VOC controls. *See* 43 Fed.Reg. 40412. However, our court has since held that once an area is redesignated, the EPA may not unilaterally change the designation. *Bethlehem Steel Corp. v. EPA*, 723 F.2d 1303 (7th Cir. 1983). Finally, the sources of VOCs in Will County are stationary and thus easier to control through implementation of various SIP and RACT programs. However, because of the large population located in Du Page and Kane Counties, a large source of VOCs is vehicular traffic, which makes it more difficult to control the source problem.

The scope of our review under the "arbitrary and capricious" standard is limted and we are not to substitute our judgment for that of the agency. Where the agency's decision is not as precise as it may be, we are obliged to uphold the decision "if the agency's path may reasonably be discerned." *Motor Vehicle Mfrs. Assn.*, 463 U.S. at 43, 103 S.Ct. at 2867. The majority argues that the record reveals the EPA has not consistently applied the same theory as to what it believes to be the proper boundaries of a nonattainment area. However, the EPA's path may reasonably and very easily be discerned in this case as a review of the administrative record reveals that since the attainment/nonattainment designation was introduced in 1978, the EPA considered the entire urban area, including those areas that are sources of the ozone in the urban areas, to be one zone for purposes of establishing that area's attainment/nonattainment status. Thus, if we are to follow the proper standard of review in assessing the decision of a federal agency, I am unable to agree with the majority's limited remand to clarify and further explain the theory the EPA followed in assessing the proper boundaries of the nonattainment areas. I respectfully dissent.

APPENDIX D

THE CLEAN AIR ACT[1]

TITLE I—AIR POLLUTION PREVENTION AND CONTROL

PART A—AIR QUALITY AND EMISSION LIMITATIONS

FINDINGS AND PURPOSES

SEC. 101. (a) The Congress finds—

(1) that the predominant part of the Nation's population is located in its rapidly expanding metropolitan and other urban areas, which generally cross the boundary lines of local jurisdictions and often extend into two or more States;

(2) that the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles, has resulted in mounting dangers to the public health and welfare, including injury to agricultural crops and livestock, damage to and the deterioration of property, and hazards to air and ground transportation;

(3) that the prevention and control of air pollution at its source is the primary responsibility of States and local governments; and

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[1] Clean Air Act (42 U.S.C. 1857 et seq.) includes the Clean Air Act of 1963—P.L. 88-206. and amendments made by the Motor Vehicle Air Pollution Control Act—P.L. 89-272 (October 20, 1965), the Clean Air Act Amendments of 1966—P.L. 89-675 (October 15, 1966), the Air Quality Act of 1967—P.L. 90-148 (November 21, 1967), the Clean Air Amendments of 1970—P.L. 91-604 (December 31, 1970), the Comprehensive Health Manpower Training Act of 1971—P.L. 92-157 (November 18, 1971), the Energy Supply and Environmental Coordination Act of 1974—P.L. 93-319 (June 22, 1974), Clean Air Act Amendments of 1977—P.L. 95-95 (August 7, 1977), and Safe Drinking Water Act of 1977—P.L. 95-190 (November 16, 1977).

(4) that Federal financial assistance and leadership is essential for the development of cooperative Federal, State, regional, and local programs to prevent and control air pollution.

(b) The purposes of this title are—

(1) to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population;

(2) to initiate and accelerate a national research and development program to achieve the prevention and control of air pollution;

(3) to provide technical and financial assistance to State and local governments in connection with the development and execution of their air pollution prevention and control programs; and

(4) to encourage and assist the development and operation of regional air pollution control programs.

AIR QUALITY CONTROL REGIONS

SEC. 107.(a) Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

(b) For purposes of developing and carrying out implementation plans under section 110—

(1) an air quality control region designated under this section before the date of enactment of the Clean Air

Amendments of 1970, or a region designated after such date under subsection (c), shall be an air quality control region; and

(2) the portion of such State which is not part of any such designated region shall be an air quality control region, but such portion may be subdivided by the State into two or more air quality control regions with the approval of the Administrator.

(c) The Administrator shall, within 90 days after the date of enactment of the Clean Air Amendments of 1970, after consultation with appropriate State and local authorities, designate as an air quality control region any interstate area or major intrastate area which he deems necessary or appropriate for the attainment and maintenance of ambient air quality standards. The Administrator shall immediately notify the Governors of the affected States of any designation made under this subsection.

(d)(1) For the purpose of transportation control planning, part D (relating to nonattainment), part C (relating to prevention of significant deterioration of air quality), and for other purposes, each State, within one hundred and twenty days after the date of enactment of the Clean Air Act Amendments of 1977, shall submit to the Administrator a list, together with a summary of the available information, identifying those air quality control regions, or portions thereof, established pursuant to this section in such State which on the date of enactment of the Clean Air Act Amendments of 1977—

(A) do not meet a national primary ambient air quality standard for any air pollutant other than sulfur dioxide or particulate matter;

(B) do not meet, or in the judgment of the State may not in the time period required by an applicable implementation plan attain or maintain, any national primary ambient air quality standard for sulfur dioxide or particulate matter;

(C) do not meet a national secondary ambient air quality standard;

(D) cannot be classified under subparagraph (B) or (C) of this paragraph on the basis of available information, for ambient air quality levels for sulfur oxides or particulate matter; or

(E) have ambient air quality levels better than any national primary or secondary air quality standard other than for sulfur dioxide or particulate matter, or for which there is not sufficient data to be classified under subparagraph (A) or (C) of this paragraph.

(2) Not later than sixty days after submittal of the list under paragraph (1) of this subsection the Administrator shall promulgate each such list with such modifications as he deems necessary. Whenever the Administrator proposes to modify a list submitted by a State, he shall notify the State and request all available data relating to such region or portion, and provide such State with an opportunity to demonstrate why any proposed modification is inappropriate.

(4) Any region or portion thereof which is not classified under subparagraph (B) or (C) of paragraph (1) of this subsection for sulfur dioxide or particulate matter within one hundred and eighty days after enactment of the Clean Air Act Amendments of 1977 shall be deemed to be a region classified under subparagraph (D) of paragraph (1) of this subsection.[2]

(5) A State may from time to time review, and as appropriate revise and resubmit, the list required under this subsection.The Administrator shall consider and promulgate such revised list in accordance with this subsection.

(e)(1) Except as otherwise provided in paragraph (2), the Governor of each State is authorized, with the approval of the Administrator, to redesignate from time to time the air quality

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[2] This paragraph was apparently intended to be numbered paragraph (3). See section 103 of Public Law 95-95.

control regions within such State for purposes of efficient and effective air quality management. Upon such redesignation, the list under subsection (d) shall be modified accordingly.

(2) In the case of an air quality control region in a State, or part of such region, which the Administrator finds may significantly affect air pollution concentrations in another State, the Governor of the State in which such region, or part of a region, is located may redesignate from time to time the boundaries of so much of such air quality control region as is located within such State only with the approval of the Administrator and with the consent of all Governors of all States which the Administrator determines may be significantly affected.

(3) No complicance date extension granted under section 113(d)(5) (relating to coal conversion) shall cease to be effective by reason of the regional limitation provided in section 113(d)(5) if the violation of such limitation is due solely to a redesignation of a region under this subsection.

IMPLEMENTATION PLANS

SEC. 110.(a)(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 109 for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region

(or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan for each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) except as may be provided in subparagraph (I)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e)) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D);

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a program to provide for the enforcement of emission limitations and regulation of the modification, construction, and operation of any stationary source, including a permit program as required in parts C and D and a permit or equivalent program for any major emitting facility, within such region as necessary to assure (i) that national ambient air quality standards are achieved and maintained, and (ii) a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be included in the applicable implementation plan for any other State under part C to prevent significant deterioration of air quality or to protect visibility, and (ii) insuring compliance with the requirements of section 126, relating to interstate pollution abatement;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this act, which reports shall be available at reasonable times for public inspection; (v) for authority comparable to that in section 303, and adequate contingency plans to implement such authority; and (vi) requirements that the State comply with the requirements respecting State boards under section 128;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards;

(H) it provides for revision, after public hearing, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements or to otherwise comply with any additional requirements established under the Clean Air Act Amendments of 1977;

(I) it provides that after June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area (as defined in section 171 (2)) to which such plan applies, if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area, unless, as of the time of application for a permit for such construction or modification, such plan meets the requirements of part D (relating to nonattainment areas);

(J) it meets the requirements of section 121 (relating to consultation), section 127 (relating to public notification), part C (relating to prevention of significant deterioration of air quality and visability protection); and

(K) it requires the owner or operator of each major stationary source to pay to the permitting authority as a condition of any permit required under this Act a fee sufficient to cover—

(i) the reasonable costs of reviewing and acting upon any application for such a permit, and

(ii) if the owner or operator receives a permit for such source, whether before or after the date of enactment of this subparagraph, the reasonable costs (incurred after such date of enactment) of implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action).

(3)(A) The Administrator shall approve revision of any implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(B) As soon as practicable, the Administrator shall, consistent with the purposes of this act and the Energy Supply and Environmental Coordination Act of 1974, review each State's applicable implementation plans and report to the State on Whether such plans can be revised in relation to fuel burning stationary sources (or persons supplying fuel to such sources) without interfering with the attainment and maintenance of any national ambient air quality standard within the period permitted in this section. If the Administrator determines that any such plan can be revised, he shall notify the State that a plan revision may be submitted by the State. Any plan revision which is submitted by the State shall, after public notice and opportunity for public hearing, be approved by the Administrator if the revision relates only to fuel burning stationary sources (or persons supplying fuel to such sources), and the plan as revised complies with paragraph (2) of this subsection. The Administrator shall approve or disapprove any revision no later than three months after its submission.

(C) Neither the State, in the case of a plan (or portion thereof) approved under this subsection, nor the Administrator in the case of a plan (or portion thereof) promulgated under subsection (c), shall be required to revise an applicable implementation plan because one or more exemptions under section 118 (relating to Federal facilities), enforcement orders under section 113(d), suspensions under section 110(f) or (g) (relating to temporary energy or economic authority) or orders under section 119 (relating to primary nonferrous smelters) have been granted, if such plan would have met the requirements of this section if no such exemptions, orders, extension, or variances had been granted.

(D) Any applicable implementation plan for which an attainment date later than December 31, 1982, is provided pursuant to section 172(a)(2) shall be revised by July 1, 1979, to include the comprehensive measures and requirements referred to in subsection (c)(5)(B).

(4) The procedure referred to in paragraph (2)(D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 111 will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

(5)(A)(i) Any State may include in a State implementation plan, but the Administrator may not require as a condition of approval of such plan under this section, any indirect source review program. The Administrator may approve and enforce, as part of an applicable implementation plan, an indirect source review program which the State chooses to adopt and submit as part of its plan.

(ii) Except as provided in subparagraph (B), no plan promulgated by the Administrator shall include any indirect source review program for any air quality control region, or portion thereof.

(iii) Any State may revise an applicable implementation plan approved under section 110(a) to suspend or revoke any such program included in such plan, provided that such plan meets the requirements of this section.

(B) The Administrator shall have the authority to promulgate, implement and enforce regulations under section 110(c) respecting indirect source review programs which apply only to federally assisted highways, airports, and other major federally assisted indirect sources and federally owned or operated indirect sources.

(C) For purposes of this paragraph, the term "indirect source" means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities subject to any measure for management of parking supply (within the meaning of section 110(c)(2)(D)(ii)), including regulation of existing off-street parking but such term does not include new or existing on-street parking. Direct emissions sources or facilities at, within, or associated with, any indirect source shall not be deemed indirect sources for the purpose of this paragraph.

(D) For purposes of this paragraph the term "indirect source review program" means the facility-by-facility review of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that a new or modified indirect source will not attract mobile sources of air pollution, the emissions from which would cause or contribute to air pollution concentrations—

(i) exceeding any national primary ambient air quality standard for a mobile source-related air pollutant after the primary standard attainment date, or

(ii) preventing maintenance of any such standard after such date.

(E) For purposes of this paragraph and paragraph (2)(B), the term "transportation control measure" does not include any measure which is an "indirect source review program."

(6) No State plan shall be treated as meeting the requirements of this section unless such plan provides that in the case of any source which uses a supplemental, or intermittent control system for purposes of meeting the requirements of an order under section 113(d) or section 119 (relating to primary nonferrous smelter orders), the owner or operator of such source may not temporarily reduce the pay of any employee by reason of the use of such supplemental or intermittent or other dispersion dependent control system.

(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air-quality standard for a period not to exceed eighteen months from the date otherwise required for submission of such plan.

(c)(1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(A) the State fails to submit an implementation plan which meets the rquirement of this section,

(B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H).

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section. Notwithstanding the preceding sentence, any portion of a plan relating to any measure described in the first sentence of section 121 (relating to consultation) or the consultation process required under such section 121 shall not be required to be promulgated before the date eight months after such date required for submission.

(2)(A) The Administrator shall conduct a study and shall submit a report to the Committee on Interstate and Foreign Commerce of the United States House of Representatives and the Committee on Public Works of the United States Senate not later than three months after date of enactment of this paragraph on the necessity of parking surcharge, management of parking supply, and preferential bus/carpool lane regulations as part of the applicable implementation plans required under this section to achieve and maintain national primary ambient air quality standards. The study shall include an assessment of the economic impact of such regulations,

consideration of alternative means of reducing total vehicle miles traveled, and an assessment of the impact of such regulations on other Federal and State programs dealing with energy or transportation. In the course of such study, the Administrator shall consult with other Federal officials including, but not limited to, the Secretary of Transportation, the Federal Energy Administrator, and the Chairman of the Council on Environmental Quality.

(B) No parking surcharge regulation may be required by the Administrator under paragraph (1) of this subsection as a part of an applicable implementation plan. All parking surcharge regulations previously required by the Administrator shall be void upon the date of enactment of this subparagraph. This subparagraph shall not prevent the Administrator from approving parking surcharges if they are adopted and submitted by a State as part of an applicable implementation plan. The Administrator may not condition approval of any implementation plan submitted by a State on such plan's including a parking surcharge regulation.

(C) The Administrator is authorized to suspend until January 1, 1975, the effective date or applicability of any regulations for the management of parking supply or any requirement that such regulations be a part of an applicable implementation plan approved or promulgated under this section. The exercise of the authority under this subparagraph shall not prevent the Administrator from approving such regulations if they are adopted and submitted by a State as part of an applicable implementation plan. If the Administrator exercises the authority under this subparagraph, regulations requiring a review or analysis of the impact of proposed parking facilities before construction which take effect on or after January 1, 1975, shall not apply to parking facilities on which construction has been initiated before January 1, 1975.

(D) For purposes of this paragraph—

(i) The term "parking surcharge regulation" means a regulation imposing or requiring the imposition of any tax, surcharge, fee, or other charge on parking spaces, or any other area used for the temporary storage of motor vehicles.

(ii) The term "management of parking supply" shall include any requirement providing that any new facility containing a given number of parking spaces shall receive a permit or other prior approval, issuance of which is to be conditioned on air quality considerations.

(iii) The term "preferential bus/carpool lane" shall include any requirement for the setting aside of one or more lanes of a street or highway on a permanent or temporary basis for the exclusive use of buses or carpools, or both.

(E) No standard, plan, or requirement, relating to management of parking supply or preferential bus/carpool lanes shall be promulgated after the date of enactment of this paragraph by the Administrator pursuant to this section, unless such promulgation has been subjected to at least one public hearing which has been held in the area affected and for which reasonable notice has been given in such area. If substantial changes are made following public hearings, one or more additional hearings shall be held in such area after such notice.

(3) Upon application of the chief executive officer of any general purpose unit of local government, if the Administrator determines that such unit has adequate authority under State or local law, the Administrator may delegate to such unit the authority to implement and enforce within the jurisdiction of such unit any part of a plan promulgated under this subsection. Nothing in this paragraph shall prevent the Administrator from implementing or enforcing any applicable provision of a plan promulgated under this subsection.

(4) In the case of any applicable implementation plan containing measures requiring—

(A) retrofits on other than commercially owned in-use vehicles,

(B) gas rationing which the Administrator finds would have seriously disruptive and widespread economic or social effects, or

(C) the reduction of the supply of on-street parking spaces.

the Governor of the State may, after notice and opportunity for public hearing temporarily suspend such measures notwithstanding the requirements of this section until January 1, 1979, or the date on which a plan revision under section 110(a)(2)(I) is submitted, whichever is earlier. No such suspension shall be granted unless the State agrees to prepare, adopt, and submit such plan revision as determined by the Administrator.

(5)(A) Any measure in an applicable implementation plan which requires a toll or other charge for the use of a bridge located entirely within one city shall be eliminated from such plan by the Administrator upon application by the Governor of the State, which application shall include a certification by the Governor that he will revise such plan in accordance with subparagraph (B).

(B) In the case of any applicable implementation plan with respect to which a measure has been eliminated under subparagraph (A), such plan shall, not later than one year after the date of the enactment of this subparagraph, be revised to include comprehensive measures (including the written evidence required by part D), to:

(i) establish, expand, or improve public transportation measures to meet basic transportation needs, as expeditiously as is practicable; and

(ii) implement transportation control measures necessary to attain and maintain national ambient air quality standards,

and such revised plan shall, for the purpose of implementing such comprehensive public transportation measures, include requirements to use (insofar as is necessary) Federal grants, State or local funds, or any combination of such grants and funds as may be consistent with the terms of the legislation providing such grants and funds. Such measures shall, as a substitute for the tolls or charges eliminated under subparagraph (A), provide for emissions reductions equivalent to the reductions which may reasonably be expected to be achieved through the use of the tolls or charges eliminated.

(C) Any revision of any implementation plan for purposes of meeting the requirements of subparagraph (B) shall be submitted in coordination with any plan revision required under part D.

(d) For purposes of this Act, an applicable implementation plan is the implementation paln, or most recent revision thereof, which has been approved under subsection (a) or promulgated under subsection (c) and which implements the requirements of this section.

(e)(1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a)(2)(A)(i) for not more than two years for an air quality control region if after review of such plan the Administrator determines that—

(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other

alternatives are not available or will not be available soon enough to permit compliance within such three-year period, and

(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for—

(A) application of the requirements of the plan which implement such primary standard to all emisssion sources in such region other than the sources (or classes) described in paragraph (1)(A) within the three-year period, and

(B) such interim measures of control of the sources (or classes) described in paragraph (1)(A) as the Administrator determines to be reasonable under the circumstances.

(f)(1) Upon application by the owner or operator of a fuel burning stationary source, and after notice and opportunity for public hearing, the Governor of the State in which such source is located may petition the President to determine that a national or regional energy emergency exists of such severity that—

(A) a temporary suspension of any part of the applicable implementation plan may be necessary, and

(B) other means of responding to the energy emergency may be inadequate.

Such determination shall not be delegable by the President to any other person. If the President determines that a national or regional energy emergency of such severity exists, a temporary emergency suspension of any part of an applicable implementation plan adopted by the State may be issued by the Governor of any State covered by the President's determination under the condition specified in paragraph (2) and may take effect immediately.

(2) A temporary emergency suspension under this subsection shall be issued to a source only if the Governor of such State finds that—

(A) there exists in the vicinity of such source a temporary energy emergency involving high levels of unemployment or loss of necessary energy supplies for residential dwellings; and

(B) such unemployment or loss can be totally or partially alleviated by such emergency suspension.

Not more than one such suspension may be issued for any source on the basis of the same set of circumstances or on the basis of the same emergency.

(3) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administator, if any. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of paragraph (2).

(4) This subsection shall not apply in the case of a plan provision or requirement promulgated by the Administrator under subsection (c) of this section, but in any such case the President may grant a temporary emergency suspension for a four month period of any such provision or requirement if he makes the determinations and findings specified in paragraphs (1) and (2).

(5) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 119, as in effect before the date of the enactment of this paragraph or section 113(d) of this Act, upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(g)(1) In the case of any State which has adopted and submitted to the Administrator a proposed plan revision which the State determines—

(A) meets the requirements of this section, and

(B) is necessary (i) to prevent the closing for one year or more of any source of air pollution, and (ii) to prevent substantial increases in unemployment which would result from such closing, and

which the Administrator has not approved or disapproved under this section within the required four month period, the Governor may issue a temporary emergency suspension of the part of the applicable implementation plan for such State which is proposed to be revised with respect to such source. The determination under subparagraph (B) may not be made with respect to a source which would close without regard whether or not the proposed plan revision is approved.

(2) A temporary emergency suspension issued by a Governor under this subsection shall remain in effect for a maximum of four months or such lesser period as may be specified in a disapproval order of the Administrator. The Administrator may disapprove such suspension if he determines that it does not meet the requirements of this subsection.

(3) The Governor may include in any temporary emergency suspension issued under this subsection a provision delaying for a period identical to the period of such suspension any compliance schedule (or increment of progress) to which such source is subject under section 119 as in effect before the date of the enactment of this paragraph, or under section 113(d) upon a finding that such source is unable to comply with such schedule (or increment) solely because of the conditions on the basis of which a suspension was issued under this subsection.

(h)(1) Not later than one year after the date of enactment of the Clean Air Act Amendments of 1977 and annually thereafter, the Administrator shall assemble and publish a comprehensive document for each State setting forth all requirements of the applicable implementation plan for such State and shall publish notice in the Federal Register of the availability of such documents. Each such document shall be revised as frequently as practicable but not less often than annually.

(2) The Administrator may promulgate such regulations as may be reasonably necessary to carry out the purpose of this subsection.

(i) Except for a primary nonferrous smelter order under section 119, a suspension under section 110(f) or (g) (relating to emergency suspensions), an exemption under section 118 (relating to certain Federal facilities), an order under section 113(d) (relating to compliance orders), a plan promulgation under section 110(c), or a plan revision under section 110(a)(3), no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation plan may be taken with respect to any stationary source by the State or by the Administrator.

(j) As a condition for issuance of any permit required under this title, the owner or operator of each new or modified stationary source which is required to obtain such a permit must show to the satisfaction of the permitting authority that the technological system of continuous emission reduction which is to be used will enable such source to comply with the standards of performance which are to apply to such source and that the construction or modification and operation of such source will be in compliance with all other requirements of this Act.

PART D—PLAN REQUIREMENTS FOR NONATTAINMENT AREAS

DEFINITIONS

SEC. 171. For the purpose of this part and section 110(a)(2)(I)—

(1) The term "reasonable further progress" means annual incremental reductions in emissions of the applicable air pollutant (including substantial reductions in the early years following approval or promulgation of plan provisions under this part and section 110(a)(2)(I) and regular reductions thereafter) which are sufficient in the judgment of the Administrator, to provide for attainment of the applicable national ambient air quality standard by the date required in section 172(a).

(2) The term "nonattainment area" means, for any air pollutant an area which is shown by monitored data or which is calculated by air quality modeling (or other methods determined by the Administrator to be reliable) to exceed any national ambient air quality standard for such pollutant. Such term includes any area identified under subparagraphs (A) through (C) of section 107(d)(1).

(3) The term "lowest achievable emission rate" means for any source, that rate of emissions which reflects—

(A) the most stringent emission limitation which is contained in the implementation plan of any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or

(B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent.

In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance.

(4) The terms "modifications" and "modified" mean the same as the term "modification" as used in section 111(a)(4) of this Act.

NONATTAINMENT PLAN PROVISIONS

SEC. 172. (a)(1) The provisions of an applicable implementation plan for a State relating to attainment and maintenance of national ambient air quality standards in any nonattainment area which are required by section 110(a)(2)(I) as precondition for the construction or modification of any major stationary source in any such area on or after July 1, 1979, shall provide for attainment of each such national ambient air quality standard in each such area as expeditiously as practicable, but, in the case of national primary ambient air quality standards, not later than December 31, 1982.

(2) In the case of the national primary ambient air quality standard for photochemical oxidants or carbon monoxide (or both) if the State demonstrates to the satisfaction of the Administrator (on or before the time required for submission of such plan) that such attainment is not possible in an area with respect to either or both of such pollutants within the period prior to December 31, 1982, despite the implementation of all reasonably available measures, such provisions shall provide for the attainment of the national primary standard for the pollutant (or pollutants) with respect to which such demonstration is made, as expeditiously as practicable but not later than December 31, 1987.

(b) The plan provisions required by subsection (a) shall—

(1) be adopted by the State (or promulgated by the Administrator under section 110(c)) after reasonable notice and public hearing;

(2) provide for the implementation of all reasonably available control measures as expeditiously as practicable;

(3) require, in the interim, reasonable further progress (as defined in section 171(1)) including such reduction in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology;

(4) include a comprehensive, accurate, current inventory of actual emissions from all sources (as provided by rule of the Administrator) of each such pollutant for each such area which is revised and resubmitted as frequently as may be necessary to assure that the requirements of paragraph (3) are met and to assess the need for additional reductions to assure attainment of each standard by the date required under subsection (a);

(5) expressly identify and quantify the emissions, if any, of any such pollutant which will be allowed to result from the construction and operation of major new or modified stationary sources for each such area;

(6) require permits for the construction and operation of new or modified major stationary sources in accordance with section 173 (relating to permit requirements);

(7) identify and commit the financial and manpower resources necessary to carry out the plan provisions required by this subsection;

(8) contain emission limitations, schedules of compliance and such other measures as may be necessary to meet the requirements of this section;

(9) evidence public, local government, and State legislative involvement and consultation in accordance with section 174 (relating to planning procedures) and include (A) an identification and analysis of the air quality, health, welfare, economic, energy, and social effects of the plan provisions required by this subsection and of the alternatives considered by the State, and (B) a summary of the public comment on such analysis;

(10) include written evidence that the State, the general purpose local government or governments, or a regional agency designated by general purpose local governments for such purpose, have adopted by statute, regulation, ordinance, or other legally enforceable document, the necessary requirements and schedules and timetables for compliance, and are committed to implement and enforce the appropriate elements of the plan;

(11) in the case of plans which make a demonstration pursuant to paragraph (2) of subsection (a)—

(A) establish a program which requires, prior to issuance of any permit for construction or modification of a major emitting facility, an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source which demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification;

(B) establish a specific schedule for implementation of a vehicle emission control inspection and maintenance program; and

(C) identify other measures necessary to provide for attainment of the applicable national ambient air quality standard not later than December 31, 1987.

(c) In the case of a State plan revision required under the Clean Air Act Amendments of 1977 to be submitted before July 1, 1982, by reason of a demonstration under subsection (a)(2), effective on such date such plan shall contain enforceable measures to assure attainment of the applicable standard not later than December 31, 1987.

PERMIT REQUIREMENTS

SEC. 173. The permit program required by section 172(b)(6) shall provide that permits to construct and operate may be issued if—

(1) the permitting agency determines that—

(A) by the time the source is to commence operation, total allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facilities, and from the proposed source will be sufficiently less than total

emissions from existing sources allowed under the applicable implementation plan prior to the application for such permit to construct or modify so as to represent (when considered together with the plan provisions required under section 172) reasonable further progress (as defined in section 171); or

(B) that emissions of such pollutant resulting from the proposed new or modified major stationary source will not cause or contribute to emissions levels which exceed the allowance permitted for such pollutant for such area from new or modified major stationary sources under section 172(b);

(2) the proposed source is required to comply with the lowest achievable emission rate;

(3) the owner or operator of the proposed new or modified source has demonstrated that all major stationary sources owned or operated by such person (or by any entity controlling, controlled by, or under common control with such person) in such State are subject to emission limitations and are in compliance, or on a schedule for compliance, with all applicable emission limitations and standards under this Act; and

(4) the applicable implementation plan is being carried out for the nonattainment area in which the proposed source is to be constructed or modified in accordance with the requirements of this part.

Any emission reductions required as a precondition of the issuance of a permit under paragraph (1)(A) shall be legally binding before such permit may be issued.

(8)

Supreme Court, U.S.
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No. 85-1372

In the Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF OHIO, PETITIONER

v.

LEE M. THOMAS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

ROBERT L. KLARQUIST
ANNE S. ALMY
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

21pp

QUESTION PRESENTED

Whether the Environmental Protection Agency properly refused to redesignate Lorain County to attainment for ozone on the ground that emissions from that county contribute to the ozone nonattainment problem in the Cleveland urban area.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A14) is reported at 776 F.2d 1333. The final decision of the Administrator of the Environmental Protection Agency (Pet. App. A15-A28) is published at 49 Fed. Reg. 24124.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on November 15, 1985. The petition for a writ of certiorari was filed on February 12, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 *et seq.*, Congress established a combined federal and state program for the control and

abatement of air pollution. Sections 108 and 109 of the Act, 42 U.S.C. 7408 and 7409, provide for the Environmental Protection Agency (EPA) to establish primary and secondary national ambient air quality standards (NAAQS) to protect the public health and welfare. Sections 107(a) and 110(a), 42 U.S.C. 7407(a) and 7410(a), require each state to adopt, and to submit to EPA for approval, a "state implementation plan" (SIP) designed to attain and maintain the NAAQS within specified deadlines.

EPA promulgated NAAQS for several air pollutants in 1971. 36 Fed. Reg. 22384 (now codified at 40 C.F.R. Pt. 50). The states submitted the required SIPs shortly thereafter, and EPA generally approved them. See, *e.g.*, 37 Fed. Reg. 10842 (1972). Under the statutory schedule, states were (with limited exceptions) to attain the primary NAAQS by mid-1975. See generally *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 845-846 (1984).

In fact, however, many areas failed to attain the NAAQS despite the development and promulgation of the necessary SIPs. See H. R. Rep. 95-294, 95th Cong., 1st Sess. 207-208 (1977). In 1977, Congress added Part D to the Clean Air Act, 42 U.S.C. 7501 *et seq.*, to establish a new and more elaborate system of air quality planning for nonattainment areas. The 1977 amendments generally permitted extension of the deadline for attaining the NAAQS to December 31, 1982 (Section 172(a)(1), 42 U.S.C. 7502(a)(1)); if a state demonstrated that attainment of the photochemical oxidant or carbon monoxide NAAQS was not possible by that date despite the use of all reasonably available control measures, the deadline for those pollutants could be extended to 1987 (Section 172(a)(2), 42 U.S.C. 7502(a)(2)). See generally *Chevron U.S.A.*, 467 U.S. at 847-849.

The 1977 amendments also added subsection (d) to Section 107 of the Act, 42 U.S.C. 7407(d). Subsection (d)(1) directed the states to "submit to the Administrator [of EPA]

a list, together with a summary of the available information, identifying those air quality control regions, or portions thereof," in which air quality (1) met the NAAQS (attainment areas), (2) did not meet the NAAQS (nonattainment areas), or (3) could not be classified for lack of information (unclassifiable areas). EPA was then required to promulgate the state lists "with such modifications as [the Administrator] deems necessary" (42 U.S.C. 7407(d)(2)). If the Administrator proposed to modify a state list, he had to notify the state, request "all available data," and provide the state with an opportunity to show why the proposed modification was "inappropriate" (*ibid.*). Subsection (d)(5) also permitted a state to revise and resubmit its lists to the Administrator for review and approval under these procedures.

In addition, the 1977 amendments required the states to submit comprehensive SIP revisions for nonattainment areas. The revised SIPs were to provide for annual incremental emission reductions sufficient to demonstrate "reasonable further progress" toward meeting the new deadlines. Section 172(b)(3), 42 U.S.C. 7502(b)(3). In particular, the revised SIPs had to provide for emission reductions from existing sources based on "reasonably available control technology" (*ibid.*), and to incorporate strict requirements governing the issuance of permits for the construction and operation of new or modified major stationary sources in the nonattainment area (Sections 172(b)(6) and 173, 42 U.S.C. 7502(b)(6) and 7503). Furthermore, revised SIPs for nonattainment areas with attainment date extensions beyond 1982, *i.e.*, those areas that had not attained the NAAQS for photochemical oxidants or carbon monoxide, had to establish schedules for implementing inspection and maintenance programs for motor vehicles. Section 172(b)(11)(B), 42 U.S.C. 7502(b)(11)(B).

2. Shortly after enactment of the 1977 amendments, EPA offered guidance to assist its regional offices and the states in preparing and reviewing the necessary nonattainment designations under the new Section 107(d). The guidelines noted that ozone[1] nonattainment areas should be of sufficient size to include most of the sources of significant impact and thus to allow unified treatment of the entire problem. See C.A. App. 19-23, 24-25, 26-27, 36-39.

EPA's directive on the designation of nonattainment areas for ozone reflected the scientific understanding of the process by which ozone is formed and transported. Unlike many other pollutants, ozone is not emitted directly into the atmosphere from an air pollution source. Instead, ozone is formed from substances known as ozone precursors, which are generally produced as a result of either fuel combustion or the use of organic chemicals in both stationary and mobile sources. Ozone precursors are released into the atmosphere and form ozone by undergoing photochemical oxidation reactions in the presence of sunlight. While in the atmosphere, ozone and its precursors are transported by the wind and can be carried considerable distances from the point of origin without significant dilution. See C.A. App. 212-214. Numerous monitoring studies conducted in major urban areas show that the point of maximum ozone concentration develops at a distance downwind from the city core area where the precursors originate. See C.A. App. 100-103, 104-118, 153-181, 217-229, 230-241, 250, 257-260. Because ozone is not emitted directly from sources but is formed

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[1]From 1971 to 1979, EPA applied an NAAQS for photochemical oxidants. In early 1979, EPA relaxed this standard and restated it to read exclusively in terms of ozone (rather than in terms of photochemical oxidants generally, which contain ozone as their major component). See 44 Fed. Reg. 8202 (1979) (now codified at 40 C.F.R. 50.9 (1984)). Ozone, which is a major component of smog, can cause serious respiratory problems.

from ozone precursors, and because ozone and ozone precursors are generally transported great distances, ozone pollution presents a regional rather than a local problem.

3. On October 5, 1978, EPA approved Ohio's status designations for ozone pursuant to Section 107(d) of the Clean Air Act. See 43 Fed. Reg. 45993 (1978). All of the counties in the Cleveland urban area, including Lorain, Cuyahoga, Lake, Medina, and Geauga Counties, were included in the Greater Cleveland Intrastate Air Quality Control Region and were classified as nonattainment for ozone. See 43 Fed. Reg. 46015-46016 (1978).

On November 22, 1982, Ohio requested that EPA revise the ozone designations of 46 counties, including Lorain, to attainment of the NAAQS for ozone. Lorain County lies immediately west and south of Cuyahoga County, in which the City of Cleveland is located; Cuyahoga County is designated nonattainment for ozone, and was not sought to be redesignated by Ohio's request. During the summer (when ozone formation is greatest), winds frequently originate from the southwest and thus blow from Lorain County into Cuyahoga and other counties in the Cleveland urban area.

On August 10, 1983, EPA published a notice of proposed rulemaking on Ohio's request for redesignation. See 48 Fed. Reg. 36275. In seeking public comment on EPA's review of the State's request, the notice proposed to approve the attainment designation for 36 counties and to retain the nonattainment redesignation for ten counties, including Lorain. EPA stated that while air quality data did not establish a violation of the ozone NAAQS in Lorain County, emissions of ozone precursors in the county represent a substantial portion of such emissions in the Cleveland urban nonattainment area and have a significant impact on ozone levels in Cuyahoga and other counties in the downwind Cleveland urban area for which the ozone

NAAQS had not been met. See 48 Fed. Reg. 36272 (1983). On that basis, EPA proposed that Lorain County should remain nonattainment for ozone.

Following public notice and comment, EPA took final action approving Ohio's redesignation of 37 counties as attainment for ozone and disapproving the State's request to redesignate nine other counties, including Lorain. See 49 Fed. Reg. 24124 (1984) (Pet. App. A15-A28). In its comments on the proposed rulemaking, Ohio conceded that emissions from Lorain County contribute to ozone concentrations in the Cleveland area that exceed the NAAQS (*id.* at A4).

4. The court of appeals denied Ohio's petition for review and upheld EPA's decision not to redesignate Lorain County as attainment for ozone (Pet. App. A1-A13). The court first held that EPA had acted within its statutory authority in defining a nonattainment area for ozone to be the urban area that includes both the locations that exceed the NAAQS and the locations that are the origin for a substantial portion of the ozone pollutants (*id.* at A8-A13). Relying on *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), the court found that the Act did not express a definition of the relevant "area" for nonattainment purposes and that EPA's position was based on a reasonable construction of the statute:

> It appears a permissible exercise of this authority [to pass upon redesignation requests] for EPA to deny redesignation with respect to a component of a nonattainment area which produced a substantial portion of the area's pollution even though the air within that component tests at an acceptable level. If it were otherwise, the fortuitous circumstance that pollutants and precursors emitted within a county are moved by

> prevailing winds to a neighboring county would deprive EPA of the tools Congress provided for attacking pollution in the area of which the county is logically a part.

Pet. App. A10-A11.

The court of appeals also concluded that under this standard EPA had properly retained Lorain County in the Cleveland urban nonattainment area. As the court explained, the record establishes that significant quantities of ozone precursors are emitted from sources in Lorain County; that tests in a number of urban areas show that ozone precursors are carried long distances in the atmosphere and then are converted to ozone in that distant location; that meterological data in the record demonstrate that during the peak ozone periods the prevailing winds blow from Lorain County into Cuyahoga and other counties that have not achieved the NAAQS; and that Ohio conceded that pollutants from Lorain County contribute to Cleveland's ozone problem (Pet. App. A7-A8, A13). Finally, the court found that it was not arbitrary for EPA to redesignate Medina County but not Lorain County since, in contrast to heavily industrialized Lorain, Medina is a largely rural area that contains only scattered sources of pollution and has insignificant levels of emissions (*id.* at A13).

Judge Wellford concurred. While joining the majority's "able analysis of the issues in this case," he wrote "separately only to bespeak my dissatisfaction with EPA's failure to conduct measurements of the wind-factor effect in the Cleveland area of emissions from Lorain County," which "would certainly have made this case less difficult in disposition" (Pet. App. A14).

ARGUMENT

1. Ohio contends (Pet. 11-16) that EPA's denial of its request to redesignate Lorain County to attainment status was inconsistent with the Clean Air Act. The court of

appeals correctly rejected Ohio's argument, and this ruling does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

In *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), this Court recently set forth the standard for judicial review of an agency's interpretation of a statute that it administers (467 U.S. at 842-843 (footnotes omitted)):

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

In applying this standard, the reviewing "court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding" (467 U.S. at 843 n.11); rather, it is enough that the agency's interpretation "is a reasonable one" (467 U.S. at 845). And "the principle of deference to administrative interpretations," which accords "considerable weight" to the agency's construction (467 U.S. at 844), has especial application to statutes like the Clean Air Act that are "lengthy, detailed, technical, [and] complex" (467 U.S. at 848). See also, *e.g.*, *Chemical Manufacturers Ass'n* v. *NRDC*, No. 83-1013 (Feb. 27, 1985), slip op. 8-9.

As the court of appeals correctly recognized, the Clean Air Act "does not speak directly to the precise question" presented in this case (Pet. App. A9). Nothing in the Act requires that each individual county in an urban area be considered separately and in isolation in determining whether compliance with an NAAQS has been achieved. Nor does the statute require EPA to ignore the fact that ozone and ozone precursors in one county are transported into other counties that exceed the NAAQS for ozone.

Ohio argues that Section 107(d)(1) of the Clean Air Act, 42 U.S.C. 7407(d)(1), requires EPA to redesignate a county as attainment if the air quality in the county meets the NAAQS. However, Section 107(d)(1)—which refers to "air quality control regions, or portions thereof, * * * which * * * have ambient air quality levels better than [the NAAQS]"—does not mention counties or otherwise identify the "portion[]" of an air quality control region that EPA should consider in its designation of attainment. Likewise, the definition of "nonattainment area" in Section 171(2), 42 U.S.C. 7501(2), upon which Ohio also relies, does "not directly deal[] with the question posed by this appeal" (Pet. App. A10). That provision defines what is meant by "nonattainment" but does not specify the "area" for which the nonattainment determination is to be made. Cf. *Chevron U.S.A.*, 467 U.S. at 860 (definition of "major stationary source" addresses the meaning of "major" but not of "stationary source").

Ohio also complains about the pollution control requirements it must meet under EPA's construction and objects that they "may or may not be the most efficient and effective means of controlling emissions which contribute to the formation of ozone" (Pet. 14). As the court of appeals explained (Pet. App. A10-A11), however, it was reasonable

> for EPA to deny redesignation with respect to a component of a nonattainment area which produced a substantial portion of the area's pollution even though the air within that component tests at an acceptable level. If it were otherwise, the fortuitous circumstance that pollutants and precursors emitted within a county are moved by prevailing winds to a neighboring county would deprive EPA of the tools Congress provided for attacking pollution in the area of which the county is logically a part.

In effect, Ohio seeks to challenge the pollution control requirements of the Clean Air Act and the desirability of EPA's chosen means for implementing the statutory program. This argument, which "really centers on the wisdom of the agency's policy, * * * must fail" (*Chevron U.S.A.*, 467 U.S. at 866).

The decision below is also consistent with the decisions of other courts of appeals on this issue. In *Illinois State Chamber of Commerce* v. *EPA*, 775 F.2d 1141 (7th Cir. 1985) (Pet. App. A29-A62), the court recognized that EPA's approach was within its statutory authority and reasonably effectuated the purposes of the Clean Air Act:

> The current state of scientific knowledge suggests that it would be worse than foolish to start with geographically small areas, for ozone, and then base the attainment status of each area on the monitoring of ozone within that area. Attainment and nonattainment are meant to reflect the contribution of an area to the pollution problem; and perhaps the *worst* way to determine the contribution of a small area to the ozone problem is to measure for ozone within the area itself. It cannot have been the intention of Congress that EPA choose the worst possible way to measure for the production of pollutants * * *.

* * * * *

> [C]ertain controls apply to nonattainment areas by operation of the statute. It is essential to the success of the Clean Air Act that these controls apply in the appropriate areas, and we refuse to construe the law in such a way that the controls will apply to areas that suffer from but do not produce ozone pollution but not to areas that produce but do not suffer from such pollution.

Pet. App. A45-A46, A48-A49. Similarly, in *Western Oil & Gas Ass'n* v. *EPA*, 767 F.2d 603 (9th Cir. 1985), the court concluded that the Clean Air Act "provide[s] for considerable EPA discretion in designating area boundaries large enough to achieve the purposes which underlie the classification scheme" (767 F.2d at 606), and that it was "common sense" and not "in excess of statutory authority" (767 F.2d at 607) for EPA to include with the nonattainment area the sources of ozone precursors that contribute to the pollution problem in the urban region.[2]

2. Ohio also contends (Pet. 6-10) that EPA's denial of redesignation in this case was not adequately supported by the rulemaking record. However, as Ohio's discussion itself makes clear, the standard for judicial review of agency decisions is well settled, and the question whether the court of appeals properly applied that standard in this case presents only a fact-bound issue that does not warrant the grant

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[2]Ohio's asserted grounds (Pet. 15 n.6) for distinguishing *Western Oil & Gas Ass'n* are unavailing. First, the fact that that case involved an initial designation rather than a redesignation is simply irrelevant, since, by Ohio's own admission (Pet. 12), the same standards apply to both determinations. Furthermore, the fact that the state supported EPA's designation in that case does not advance Ohio's argument that the statute on its face requires a county meeting the NAAQS to be designated as attainment regardless of its contribution to pollution problems in the rest of the urban area.

of certiorari. See, *e.g., American Textile Manufacturers Inst.* v. *Donovan,* 452 U.S. 490, 523 (1981); *Mobil Oil Corp.* v. *FPC,* 417 U.S. 283, 310 (1974); *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 491 (1951).

In any event, the court of appeals correctly upheld EPA's determination. The rulemaking record demonstrates that significant quantities of ozone precursors are emitted from sources in Lorain County and that the prevailing winds blow from Lorain to Cuyahoga and other counties during the peak ozone season (Pet. App. A8). In addition, studies in other urban areas show that ozone precursors are carried long distances in the atmosphere before they are converted into ozone (*id.* at A13); as the court of appeals found, these tests "were sufficiently similar to form a reliable basis for concluding that the same condition would occur in Cleveland" (*ibid.*). And it is undisputed that Cuyahoga County—for which Ohio did not even seek redesignation—is out of compliance with the ozone NAAQS (*id.* at A3, A11). Based on these factors, the court of appeals properly concluded that "[t]he technical materials in this record support the conclusion that the contribution of Lorain County's emissions to the Cleveland ozone problem is significant" (*id.* at A13). In fact, "Ohio admitted on the record that emissions from Lorain [C]ounty contribute to the ozone concentrations in the Cleveland area" (*ibid.*), which by itself serves to establish that EPA did not act in an arbitrary and unsupported fashion.

Ohio argues (Pet. 10) that the record was inadequate because the studies on the transportation of ozone precursors and the formation of ozone did not specifically relate to the Cleveland area. However, these studies were used here for their treatment of general scientific principles and provided a reliable basis for applying their findings in this case (Pet. App. A13); thus, "the fact that EPA did not conduct measurements of the wind-factor effect in the Cleveland

area is [not] important" (*ibid.*).[3] Ohio further asserts (Pet. 9) that it was irrational for EPA to redesignate Medina but not Lorain County as attainment for ozone. The court of appeals correctly rejected this assertion, noting that "Lorain County is heavily industrialized while Medina County is largely rural" and that "compared with the emissions from Lorain County * * * those from Medina County are insignificant" (Pet. App. A13).

Finally, contrary to Ohio's contention (Pet. 5-8), the decision below does not conflict with the Seventh Circuit's decision in *Illinois State Chamber of Commerce* v. *EPA, supra.* In that case, a divided panel set aside EPA's decision not to redesignate certain counties in Illinois as attainment for ozone on the ground that the agency had "not made clear the rationale for its action" (Pet. App. A49). Accordingly, the court remanded "for reconsideration by EPA and for clarification of the grounds upon which it has dealt or will deal with the Illinois request" (*id.* at A49-A50). Nothing in *Illinois State Chamber of Commerce* suggests that the Seventh Circuit applied a different standard of review than the one followed by the Sixth Circuit here,[4] and the court's remand for clarification of that record does not conflict with the decision below that the entirely distinct record in this case was adequate to sustain EPA's action. Ohio's claimed conflict represents nothing more than the application of settled legal standards to the different factual records in the two cases.

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[3]Ohio also relies on the concurring opinion of Judge Wellford, who expressed his belief that such measurements "would certainly have made this case less difficult in disposition" (Pet. App. A14). Notwithstanding his "dissatisfaction" (*ibid.*), however, Judge Wellford concurred in "the able analysis" (*ibid.*) and judgment of the court.

[4]See also, *e.g., Cerro Copper Products Co.* v. *Ruckelshaus,* 766 F.2d 1060, 1066-1067 (7th Cir. 1985).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

ROBERT L. KLARQUIST
ANNE S. ALMY
Attorneys

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